THE

CEYLON LAW REPORTS,

BEING

REPORTS OF CASES DECIDED

BY THE

SUPREME COURT OF CEYLON.

EDITORS:

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(ADVOCATES.)

VOLUME III.

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1897.

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JUDGES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

Chief Justice: THE HON'BLE SIR JOHN WINFIELD BONSER, KT.

„ A. C. LAWRIE *(Acting)*.

Puisne Justices: THE HON'BLE ARCHIBALD CAMPBELL LAWRIE,

„ GEORGE HENRY WITHERS,

„ DODWELL FRANCIS BROWNE *(Acting)*.

Attorney-General: THE HON'BLE CHARLES PETER LAYARD.

„ PONAMBALAM RAMANATHAN *(Acting)*.

Solicitor-General.: PONAMBALAM RAMANATHAN, C. M. G.

JOHN HARVEY TEMPLER, C. C. *(Acting)*.

MEMORANDA.

1893.	November	14.	JOHN WINFIELD BONSER, Esquire, was sworn as Chief Justice, on promotion from the Chief Justiceship of the Straits Settlements. (He received, in January, 1894, the honour of Knighthood.)
1894.	May	4.	The Hon. C. P. LAYARD, Attorney-General, having left Ceylon on furlough, P. RAMA NATHAN, Esquire, Solicitor-General, was sworn as Acting Attorney-General, and J. H. TEMPLER, Esquire, Crown Counsel, as Acting Solicitor-General. (They continued to act until Mr. LAYARD resumed duties on May 1, 1895.)
	August	2.	The CHIEF JUSTICE left Ceylon on furlough.
	August	14.	The Hon. A. C. LAWRIE, Senior Puisne Justice, was sworn as Acting Chief Justice.
	October	26.	DODWELL F. BROWNE, Esquire, District Judge of Colombo, was sworn as an Acting Puisne Justice.
1895.	May	5.	The CHIEF JUSTICE returned and resumed duties, and Mr. D. F. BROWNE reverted to his permanent office of District Judge.
	June	5.	Mr. JUSTICE LAWRIE having left the Island on furlough, Mr. D. F. BROWNE was sworn as an Acting Puisne Justice.
1896.	January	9.	Mr. JUSTICE LAWRIE returning to Ceylon and resuming duties, Mr. D. F. BROWNE reverted to his permanent office of District Judge.
	May	8.	The Hon. C. P. LAYARD going on furlough, Mr. P. RAMA NATHAN, Solicitor-General, was appointed to act for him, and Mr. J. H. TEMPLER for Mr. RAMA NATHAN as Solicitor-General.
	August	9.	The Hon. C. P. LAYARD returned and resumed duties.

DIGEST.

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Administration.

1.—*Action by creditor of decedent—"Administrator's year"—Plea in bar—Civil Procedure Code, Chapters* xxxviii. *and* lv. *and sections* 720, 721, 725.

The creditor of a deceased person is entitled to maintain an action for his debt against the latter's executor or administrator immediately after grant of probate or letters, and there is no law either in the Civil Procedure Code or elsewhere which postpones his right of action until a year has expired from such grant.

D. C. Colombo, No. 3,085 C. PERERA v. FERNANDO 3

2.—*Heir transferring intestate's property pending administration—Effect of such transfer.*

Succession to an intestate's estate devolves immediately upon his death, and it is competent for the heirs-at-law to alienate the property pending the administration of the estate. Such alienation vests good title in the alienee, subject only to be defeated by proper disposal of the property by the administrator in due course of administration.

D. C. Kandy, No. 6,474. TIKIRI BANDA v. RATWATTE 70

Animal, injury by.

Liability of owner—Scienter—Animal feræ naturæ—*Trespass—Negligence.*

Where injury is done by an animal while trespassing the owner is liable for the injury, whatever the nature of the animal, and whether or not the owner knows of its vicious propensities. Where, however, the animal is in its proper place and the injured person has no right to be there the owner is not liable.

But where neither the animal nor the person injured is trespassing the liability of the owner depends on the nature of the animal and on the knowledge of the owner as to its viciousness; that is to say, if the animal is *feræ naturæ*, or even if it be *mansuelæ naturæ*, of a nature which is uncertain and capricious, the owner is bound to keep it in complete control, and if any injury is done, he is liable; but in the case of a domestic animal the owner is only liable if he knows that it is vicious.

In any of these cases the liability of the owner is not altered by the fact that the animal is in the custody of a stranger at the time when the injury is committed.

C. R. Panadura, No. 1,094. SOYSA v. DON CHARLES 43

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Appeal.

1.—*Appealable order—Courts Ordinance, section* 39—*Civil Procedure Code, section* 754—*Nindagama—Proprietor—Services—Lease—Right of lessee—Agricultural and personal services—Rajakaria—Authority to recover money in lieu of rajakaria—Pleading—Construction.*

The plaintiff sued the defendants as tenants of a panguwa in a certain nindagama for a sum of Rs. 121·25 as value of the services due by them, alleging that "by a deed of lease" granted by the proprietor of the nindagama the plaintiff "was empowered and authorized to recover the rents and produce of the said nindagama and the rajakaria services from the tenants or the commuted value thereof for 1891-1892". The deed referred to bore that the plaintiff was "ordained to take produce and recover money from the tenants in lieu of rajakaria". The court decreed that "the defendants do each severally pay to plaintiff such portion of the sum of Rs. 121·25 and of costs of case as will bear the same ratio to that sum as his individual interest in the panguwa may bear to the whole value of the panguwa, the amount of such portion to be the subject of future adjudication before execution shall issue".

Held (WITHERS, J., dissenting), that an appeal lay from the above judgment.

Held, that the plaintiff's action cannot be sustained—

By LAWRIE, A. C. J., on the ground that when the services due by the tenants of a nindagama are agricultural, that is, work to be done on lands in the possession of the proprietor, the right to demand the services cannot be transferred by way of lease to another unless at the same time the lands on which the services are to be performed are likewise leased, and that when the services are personal the proprietor cannot under any circumstances lease the right to demand such services.

By WITHERS, J., on the ground that upon a true construction of the deed, under which the plaintiff claims, the authority therein contained is limited to the taking of money if tendered in lieu of services, and does not empower the plaintiff to sue for and recover the commuted value of the services if not duly rendered.

Held, further (by LAWRIE, A. C. J., and WITHERS, J.) that an action for damages for non-performance of services by tenants cannot be sustained in the absence of allegation and proof that the tenants were duly required to perform the services and failed therein.

D. C. Kegalla, No. 224. SIATU v. KIRY SADUWA 17

2.—*Appeal notwithstanding lapse of time—Appeal originally filed in time, rejected at hearing—Civil Procedure Code, sections* 756, 765, 766, 767.

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Section 765 of the Civil Procedure Code empowers the Supreme Court to admit and entertain a petition of appeal from a decree of any original court, "although the provisions of sections 754 and 756 have not been observed".

Held, that the power of the court extended to all cases in which a regular appeal had not reached the court under the provisions of sections 754 and 756, including cases in which (a petition of appeal having been filed in time) the appeal had abated owing to default in the subsequent steps.

D. C. Colombo, No. 2,402C. PIERIS v. SILVA 21

3.—*Remarks by magistrate after petition of appeal filed—Practice.*

The practice of magistrates of appending notes to their judgments after petition of appeal has been filed commented on.

P. C. Negombo, No. 16,629. TELASINHA v. GABRIEL 43

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Arbitration.

Arbitration—Award—Matters not within the reference—Amendment of award—Judgment—Jurisdiction—Civil Procedure Code, sections 687, 688.

Section 687 of the Civil Procedure Code provides that within fifteen days from the date of receipt of notice of the filling, of an award any party to the arbitration may apply by petition to set aside, modify, correct, or remit the award on grounds mentioned in the subsequent sections.

Section 688 (*a*) enacts that the court may modify or correct an award where it appears that part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred.

Held, that it is competent for the court under Chapter li. of the Code to modify or correct an award or remit it to the arbitrator of its own motion without any application therefor by any party under section 687.

C. R. Colombo, No. 93C. HENDRICK APPU v. JUANIS NAIDE 60

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Buddhist Ecclesiastical Law.

*Vihare—Succession—*Sisyanu Sisyaparamparawe*—Incumbent—Failure of pupils—Right of co-pupils—Plaint—Pleading—Legal objection.*

Under the law of pupillary succession to a Buddhist vihare, if the last incumbent leaves no pupil and has not nominated a successor by deed or will, the incumbency can pass to his co-pupils only if their common tutor was himself in the line of succession from the founder or original grantee of the vihare.

D. C. Colombo, No. 42,709, Ram. (1863-68) 280; *D. C. Kandy*, No. 74,378, 2 S. C. C. 27; and *D. C. Matara*, No. 30,710, 5 S. C. C. 8, commented on.

Per WITHERS, J.—An objection to a plaint as disclosing no cause of action may be taken *ore tenus* at any time, subject only to the discretion of court as to costs.

D. C. Negombo, No. 15,735. SUMANA TERUNANSE v. KANDAPPUHAMY 14

Buddhist Temporalities Ordinance.

Trustee—Member of Committee—Election—Residence—Qualification "to be elected or to serve"—Ordinance No. 3 of 1889, sections 4, 7, 8, 17, 39, 40.

Section 17 of the Buddhist Temporalities Ordinance, No. 3 of 1889, enacts that no person who does not possess the qualifications described in section 8 of the Ordinance shall be competent "either to be elected or to serve as trustee".

Under section 8 of the Ordinance a person, among other qualifications, "must have been the occupier of a house within the district either as owner or tenant for one year previously to the date of his election."

Held, that under the above enactments, where a person had the necessary qualification as to residence at the time of his election as trustee it is not necessary, in order to serve as such trustee, that he should continue to reside within the district, and he does not cease to be trustee by reason of change of residence during service.

D. C. Kandy, No. 6,974. BANDA v. BUDHARAKKETA UNANSE 79

Cancellation.

See STAMP, 2.

Carriage hire.

Non-payment of hire—Contract between owner and hirer—Criminal prosecution—Civil action—Ordinance No. 17 of 1873, section 16.

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Section 16 of Ordinance No. 17 of 1873 enacts: "If any person shall refuse or omit to pay to the proprietor..........the sum justly due for the hire of a carriage..........it shall be lawful for the police court..........upon complaint of the proprietor and summary proof of the facts, to award reasonable satisfaction to the party so complaining for his fare or for his damages and costs,..........and upon the neglect or refusal of such defaulter or offender to pay the same, the same shall be recovered as if it were a fine imposed by such court."

Held, that the provisions of the above section apply only where the fare is to be paid immediately upon the termination of the journey, and that therefore where a carriage is ordered and used upon an understanding that the hire is to be entered as a debt due by the hirer in an account thereafter to be rendered, the proprietor cannot avail himself of the above provisions but must resort to a civil court for the recovery of the amount due.

M. C. Colombo, No. 5,200. WEERAPPA v. SPENCER 10

Certifying payment.

See CIVIL PROCEDURE, 3.

Civil Procedure.

1.—*Judgment of consent—Consent irregularly obtained—Power of court to vacate previous decree—Jurisdiction—Mistake.*

A court has an inherent right to vacate an order or decree into which it has been surprised by fraud, collusion, or mistake of fact.

Where, therefore, a decree was entered for plaintiff by consent of defendant's proctor and the defendant subsequently denied his proctor's authority to give such consent and applied to set aside the decree—

Held, that it was competent for the court, if satisfied as to absence of authority in the proctor to consent, to set aside the decree.

C. R. Colombo, No. 5,060. MOHIDEEN v. KADER 13

2.—*Minor—Action by minor—Curator—Certificate—One curator for several minors—Next friend—Guardian* ad litem *—Minor suing on contract between curator and third party—Civil Procedure Code, Chapters* xxxv. *and* xl.

Under Chapter xl. of the Civil Procedure Code, it is not necessary, in the case of several minors, to issue a separate certificate of curatorship for each minor, but one curator may be appointed and one certificate issued to him in respect of all the minors.

A minor cannot sue or defend by a curator appointed under Chapter xl. of the Code, but can only do so by a next friend or guardian for the action, as the case may be, appointed under Chapter xxxv. Therefore, if a person to whom a certificate of curatorship has been issued in respect of the estate of a minor desires to bring an action in the name of the minor, he must first have himself specially appointed next friend of the minor for that purpose.

D. C. Kalutara, No. 847. FERNANDO v. WEERASINHE 67

3.—*Certifying payments to court after decree—Petition—Affidavit—Civil Procedure Code, sections* 349, 376.

Section 349 of the Civil Procedure Code enacts: "If any money payable under a decree is paid out of court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the court whose duty it is to execute the decree. The judgment-debtor may also by petition inform the court of such payment or adjustment and apply to the court to issue a notice to the decree-holder to shew cause on a day to be fixed by the court why such payment or adjustment should not be recorded as certified."

Held, that where the judgment-debtor applies under the above section it is not enough to present a petition alleging the payment or adjustment, but the petition must be supported by affidavit or deposition on oath before notice to shew cause can be issued.

D. C. Negombo, No. 15,078. KANNAPPA CHETTY v. CROOS 69

4.—*Trial—One proctor appearing for another—Authority—Appearance of parties—Absence of parties—Civil Procedure Code, sections* 24, 25, 27, 72, *and* 84.

The appearance of a proctor for the duly appointed proctor of a party is not an appearance of the party within the meaning of section 24 of the Civil Procedure Code.

Where, therefore, at the trial of an action both the plaintiff and his proctor were absent and another proctor appearing for the plaintiff's proctor applied for a postponement, which being disallowed a final decree of dismissal of the action was entered—

Held, that there was a default of appearance of the plaintiff and that the proper course was not to dismiss the action absolutely but to enter a decree *nisi* under the provisions of section 84 of the Code.

D. C. Kandy, No. 6,620. HABIBU LEBBE v. PUNCHI ETTENA 84

5.—*Claim in execution on behalf of minor—Inquiry into claim—Action under section* 247 *of the Civil Procedure Code—Guardian—Next friend—Practice.*

A claim on behalf of a minor to property seized in execution can only be made by a duly appointed guardian. In default thereof the minor is not a party to the claim proceedings or any order passed therein, and consequently an action under section 247 of the Code, after the disallowance of the claim, is not tenable, even though it be brought by a guardian appointed by the court for the purpose.

D. C. Kegalle, No. 160. JALALDEEN v. MEERAPULLE 26

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Consent judgment.

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Contract.

Joint contractors—Promissory note—Survival of liability against surviving makers alone.

Upon a joint contract, where there is no partnership between the contractors, and one of them is dead, the liability to be sued survives to the surviving contractors alone, and not to the surviving contractors and the legal representetive of the deceased contractor jointly.

D. C. Kurunegala, No. 612—M423. WALLEAPPA CHETTY v. SINNETAMBY.. .. 90

Criminal law.

1.—*Cruelty to animals—Cutting with knife a trespassing animal—Ordinance No. 7 of* 1862.

Cutting and wounding with a knife an animal even while trespassing, where the infliction of such pain is not necessary for the protection of the property trespassed upon, is an offence within section 1 of the Ordinance No. 7 of 1862.

P. C. Kandy, No. 17,435. OPALANGU v. MUDIANSE 48

2.—*False evidence—Materiality—Intention —Ceylon Penal Code, sections* 188, 190.

Under the Ceylon Penal Code the materiality of the statement of a witness in the course of a judicial proceeding is not an essential part of the offence of intentionally giving false evidence, but may only be relevant to the question whether the witness had the intention to swear falsely.

D. C. Colombo, Criminal, No. 832. THE QUEEN v. HABIBU MAHAMADU 57

Criminal Procedure.

1.—*Crown costs—Non-summary case—Power of police magistrate—Ordinance No.* 22 *of* 1890—*Criminal Procedure Code, section* 236.

Under section 236 of Chapter xix. of the Criminal Procedure Code as amended by Ordinance No. 22 of 1890, a police magistrate can award Crown costs only in cases where he has power to try summarily.

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P. C. Negombo, No. 6,777, 8 S.C.C. 196, distinguished.

P. C. Colombo, No. 26,082. FERNANDO v. FERNANDO 13

2.—*Several defendants—Frivolous charge—Compensation—Power of magistrate—Criminal Procedure Code, section* 236.

Under section 236 of the Criminal Procedure Code, a police magistrate has power to direct the complainant to pay as compensation the sum of Rs. 10 to each of several accused persons.

Kanapatipillai v. *Vellaiyan*, 7 S. C. C. 200, commented on.

P. C. Galle, No. 11,680. ARNOLIS v. BABUNHAMY 49

3.—*Compensation—Crown costs—Complaint on information*—Bona fides *of complainant—Revision—Criminal Procedure Code, section* 236.

Where a charge is brought on information and is ultimately dismissed, it is irregular for a police magistrate to impose compensation and crown costs on the complainant, unless the magistrate finds that the complainant did not in fact receive such information or did not *bona fide* believe it to be true.

P. C. Panadura, No. 11,184. PERERA v. PERERA 91

4.—*Plea of previous conviction—Charge in more aggravated form on same facts —Voluntarily causing grievous hurt —Criminal Procedure Code, section* 399.

Where a person has been tried for and convicted of an offence he cannot again be charged on the same facts in a more aggravated form.

Where an accused, who had been convicted of the offence of voluntarily causing hurt under section 314 of the Penal Code, was again charged with and tried for voluntarily causing hurt to the same person and at the same time and place by means of a cutting instrument under section 315—

Held, that the previous conviction was a bar to the trial on the second charge.

D. C. Chilaw, Criminal, No. 2,443. THE QUEEN v. ROMEL APPU.. 52

5.—*Public nuisance—Obstruction of a public way—Abatement—Claim of right —Power of police magistrate to decide title—Jurisdiction—Criminal Procedure Code, section* 115.

In a proceeding under section 115 of the Criminal Procedure Code for the removal of an obstruction or nuisance from a public way, the police magistrate has no jurisdiction to inquire into or decide any question of title set up by the defendant.

The course to be followed, where a claim of right is made, pointed out.

P. C. Jaffna, No. 12,570. CHELLAPPA v. MURUKASER 73

Crown costs.

See CRIMINAL PROCEDURE, 1.
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Crown land.

Paddy field—Payment of half crop to the Crown—Acknowledgment of title—Cultivating and improving Crown land—Right of cultivator to a grant from the Crown—Ordinance No. 12 *of* 1840, *section* 8.

The payment of half the value of the crop of paddy land as grain tax amounts to an acknowledgment of the title of the Crown to the land.

Section 8 of Ordinance No. 12 of 1840 provides: "Whenever any person shall have, without any grant or title from Government, taken possession of and cultivated, planted, or otherwise improved any land belonging to Government, and shall have held uninterrupted possession thereof for not less than ten or more than thirty years, such person shall be entitled to a grant from Government of such land, on payment by him or her of half the improved value of the said land," &c.

Held, that the above provision applies only to those who possess and cultivate adversely to the Crown and without any acknowledgment of title in the Crown.

Held, by LAWRIE, J., that the right to a grant from the Crown under the above section is personal to the cultivator and possessor himself and does not descend to his heirs, and further that though a grantee from the Crown had in fact not fulfilled the requirements of the above section, still the grant gives him good title to the land as against one who might have been entitled to obtain but did not in fact obtain a grant.

D. C. Kalutara, No. 521. WIRARATNE *v.* ENSOHAMI 49

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Execution of decrees.

1.—*Mortgage decree—"Sum awarded" over Rs.* 200*—Judgment reduced by levy to less than Rs.* 200*—Liability of defendant to arrest—Civil Procedure Code, section* 299*—Practice.*

Under section 299 of the Civil Procedure Code a judgment-debtor is liable to be arrested under writ against the person for the unsatisfied balance of the judgment, even though such balance is less than Rs. 200, provided the original decree was for a sum amounting to or exceeding Rs. 200.

D. C. Colombo, No. 2,670. SILVA *v.* SELLA UMMA 41

2.—*Property in custody of a public officer—Money deposited as security by an employe—Seizure under private creditor's writ—Hypothec—Right of the execution-creditor to compel the money being brought into court—Preferent claim—Civil Porcedure Code, sections* 229, 230, 232.

Where money was deposited with a public officer by an employe and was hypothecated by bond as security for the due discharge of the employe's duties—

Held, that the money could be seized in the hands of the public officer in execution of a judgment obtained against the employe by a private creditor under the provisions of section 232 of the Civil Procedure Code, and that the public officer was bound to bring the money into court at the instance of the execution-creditor, subject to the right of the public officer to have the question of hypothec or other preferent claim determined by the court.

D. C. Colombo, No. C2,754. ALBRECHT *v.* GREBE 59

3.—*Assignment of money decree—Substitution of assignee in the room of the decree-holder—Affirmance of the decree in appeal—Appeal to the Privy Council—Civil Procedure Code, section* 339.

An appeal *ipso facto* suspends a decree, and nothing can be done thereon unless otherwise provided by law, but steps taken to bring a decree of the Supreme Court in review in order to an appeal to Her Majesty in Council and even the judgment of the Collective Court in review do not constitute an actual appeal so as to stop the execution of the decree.

Where a decree of the district court was affirmed in appeal by the Supreme Court, and steps having been taken by the appealing party to have the judgment of the Supreme Court brought up in review preparatory to an appeal to the Privy Council, a certificate was issued in pursuance of section 781 of the Code and a day was fixed for the hearing of the case in review, and where thereafter an assignee of the decree was upon his application allowed by the district court to have his name substituted for that of the decree-holder in the record of the decree and to issue execution—

Held, that the district court was the court competent to execute the decree, as the judgment of the Supreme Court in appeal became the judgment of the district court; and it was within the discretion of the district court to execute the decree for the benefit of the assignee; but that in view of the intended appeal to Her Majesty in Council the proper form of order should have been, not to substitute the name of the assignee in the record of the decree, but to allow execution in the name of the assignor, due entry being made in the record as to the assignee who was allowed to take out execution in his assignor's name.

D. C. Colombo, No. C1,417. CASSIM LEBBE MARIKAR *v.* SARAYE LEBBE 61

4.—*Execution, application for—Decree more than a year old—Decree payable by*

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instalments—Notice to execution-debtor —Civil Procedure Code, sections 194, 347.

Section 347 of the Civil Procedure Code enacts that "in cases where there is no respondent named in the petition of application for execution, if more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the judgment-debtor."

Where the holder of a decree payable by instalments applies for execution on failure of the judgment-debtor to pay an instalment—

Held, that the judgment-debtor is entitled to notice under the above section, if a year has elapsed between the original decree and the application for execution, even though the instalment became due within a year of such application.

D. C. Colombo, No. C2,974. PERICHCHIAPPA CHETTY v. JACOLYN 91

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Fiscal's Sale.

1.—*Material irregularity in publishing and conducting sale—Injury—Civil Procedure Code, sections* 276, 282.

To entitle a party to set aside a fiscal's sale on the ground of material irregularity in the publication or conducting of the sale under section 282 of the Civil Procedure Code, it must be shown that the substantial injury alleged to have been sustained arose directly from the irregularity complained of.

C. R. Chilaw, No. 925. AMERESEKERE v. KIRIMENIKA 30

2.—*Setting aside sale for irregularity—Party "interested" in the property sold —Writ-holder in another action—Right of concurrence in proceeds sale—Civil Procedure Code, sections* 282, 352.

Section 282 of the Civil Procedure Code enacts: "The decree-holder, or any person whose immoveable property has been sold under this chapter, or any person establishing to the satisfaction of the court an interest in such property, may apply by petition to the court to set aside the sale on the ground of a material irregularity in publishing or conducting it."

Held, that a decree-holder in another action, who has obtained a judgment against the same debtor and who is entitled to share rateably in the proceeds of sale of the debtor's property under section 352 of the Code, is a person having an "interest" in such property within the meaning of section 282, and may apply thereunder to have the sale in execution set aside.

D. C. Kandy, No. 4,205. KOMERAPPA v. MUTTIAH 58

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3.—*Material irregularity in conducting sale—Decree-holder bidding and purchasing without sanction of court—Civil Procedure Code, sections* 272, 282.

The fact of the decree-holder bidding and purchasing at an execution sale without the previous sanction of the court, required by section 272 of the Civil Procedure Code, is not a material irregularity in the publishing or conducting of the sale within the meaning of section 282.

D. C. Galle, No. 54,732. SILVA v. UPARIS .. 75

Foreign judgment.

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Forest Ordinance.

"*Forest-produce*"—"*Timber*", *removal of—Regulations under section* 44 *of Ordinance No.* 10 *of* 1885—Government Gazette, *September* 2, 1887—*Ordinance No.* 1 *of* 1892, *section* 14.

Section 44 of Ordinance No. 10 of 1885 provides for regulations being made (subsection (b)) for prohibiting the removal of "forest-produce" without a pass, "forest-produce" being defined in the interpretation clause as including timber when found in or brought from a forest.

Section 14 of the amending Ordinance No. 1 of 1892 enacts that the terms "forest-produce" and "timber" in the above section shall, after the passing of the later Ordinance, include timber cut on any land, whether the property of the Crown or any private individual.

Held, that the amending Ordinance does not affect retrospectively the regulations framed under the principal Ordinance, and that therefore a regulation, framed before the passing of the amending Ordinance, prohibiting the removal of forest-produce without a pass is of no force so as to make the removal, after the passing of the amending Ordinance, of "timber" cut on any private land an offence.

P. C. Galle, No. 10,491. ALEXANDER v. ALWIS 12

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See MERCHANDISE MARKS ORDINANCE.

Gaming.

1.—*Common gaming place—Private house —Entry by police—Presumption—Ordinance No.* 17 *of* 1889, *sections* 6, 7, 8, *and* 10—*Criminal Procedure Code, Chapter V.*

Section 10 of Ordinance No. 17 of 1889 provides: "If any instruments or appliances for gaming are found in any place entered under this Ordinance.. or if persons are seen or heard to escape therefrom on the approach or entry of any magistrate, police officer, or person authorised to search such place ......it shall be presumed, until the contrary is proved, that the place is a common gaming place."

Held, that the entry contemplated by the above section is that provided for by sections 7 and 8 of the Ordinance under which alone a private house can be visited or searched, and that therefore the presumption that a private house, in which gaming

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instruments are found, or from which persons are seen to escape, on the entry of a police officer, is a common gaming place, does not arise, unless the entry has been made under a warrant issued by a magistrate under section 7 of the Ordinance.

P. C. Colombo (addl.), No. 4,821. JONKLAAS v. PERERA 1

2.—*Games of chance—Playing for a stake—Ordinance No.* 3 *of* 1840—*Ordinance No.* 4 *of* 1841—*Ordinance No.* 17 *of* 1889.

To constitute the offence of unlawful gaming under the Ordinance No. 17 of 1889 it is essential that the gaming should be for a stake.

P. C. Panadure, No. 8,816. PERERA v. SADIRAPPU 2

Garnishee.

See EXECUTION OF DECREES, 2.

Guardian for the action.

See CIVIL PROCEDURE, 2.
CIVIL PROCEDURE, 5.

Heirs, transferring decedent's land.

See ADMINISTRATION, 2.

Improving Crown land.

See CROWN LAND.

Instalments, decree payable by.

See EXECUTION OF DECREES, 4.

"I. O. U."

See STAMP, 1.

Joint contractors.

See CONTRACT.
SUMMARY PROCEDURE ON LIQUID CLAIMS, 4.

Journeyman artificer.

See MASTER AND SERVANT.

Jurisdiction.

See CIVIL PROCEDURE, 1.
CRIMINAL PROCEDURE, 5.
MERCHANDISE MARKS ORDINANCE.

Kandyan Law.

Deed of gift—Gift by husband to wife—Disinherison of children.

In a deed of gift under the Kandyan Law, a clause of disinherison is not necessary where the gift is by a husband to his wife, nor where it does not embrace all the *paraveni* lands of the donor.

D. C. Badulla, No. 661. APPUHAMY v. KIRI MENIKA.. 81

See MARRIAGE.

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Land acquisition.

See REGISTRATION, 1.
REGISTRATION, 4.

Leave to appear and defend.

See SUMMARY PROCEDURE ON LIQUID CLAIMS.

Legitimation of issue.

See MARRIAGE.

Licensing Ordinance.

Selling liquor during prohibited hours—Ordinance No. 12 *of* 1891, *section* 39, *subsection* 2—*Evidence.*

Ordinance No. 12 of 1891, section 39, subsection 2, makes it an offence for the keeper of an hotel or refreshment room to sell therein any intoxicating liquor to any person after the hour of midnight and before the hour of five in the morning.

Held, that under the above enactment it is not enough to prove that persons were seen consuming intoxicating liquor at an hotel during the prohibited hours, but it is incumbent on the prosecution to prove that the liquor was delivered during such hours and that it was so delivered by the accused or by his order.

M. C. Colombo, No. 115. VANHOUTEN v. GAUDER 56

Life-interest.

See WILL, 1.
WILL, 2.

Limitation of actions.

See MARRIAGE.

Liquor, illicit sale of.

See LICENSING ORDINANCE.

Marriage.

Marriage—Person with whom adultery has been committed—Legitimation per subsequens matrimonium—*Ordinance No.* 6 *of* 1847, *section* 31—*Donation to concubine and illegitimate children—Validity as against wife and legitimate issue*—Querela inofficiosæ donationis—*Limitation—Ordinance No.* 22 *of* 1871, *section* 11.

The Ordinance No. 6 of 1847 does not contain the whole law regulating the marriages of persons subject to that Ordinance, and the Roman Dutch Law of marriage, so far as it has not been altered by Ordinance, is still in force. By that law a man could not contract a valid marriage with a woman with whom in his wife's lifetime he had committed adultery; and this impediment still exists in Ceylon.

Where therefore a Sinhalese man, a native of the maritime provinces, married to a Sinhalese wife, also a native of those provinces, had during the marriage lived in adultery with another woman,

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and had after his wife's death gone through the form of marriage with the latter—

Held, per BONSER, C. J., and WITHERS, J. (*dissentiente* LAWRIE, J.), that such marriage was null and void.

Per LAWRIE, J.—The whole law as to disability to marry, applicable to natives of Ceylon, is to be found in our Marriage Ordinances, the old common law having been repealed and abolished; and no prohibition of such a marriage is to be found in those Ordinances, and such marriage is therefore valid.

When a man has made to a concubine or illegitimate child a donation, which his heir desires to impeach by the *querela inofficiosæ donationis*, he must by the Roman Dutch Law bring action within five years of the donor's death; and this period of limitation is now reduced to three years by Ordinance No. 22 of 1871, section 11.

D. C. Kandy, No. 6,563. KARANCHY HAMY v. ANGO HAMY.. 93

Master and servant.

"Journeyman artificer"—Machine-ruler—Ordinance No. 11 *of* 1865, *sections* 5, 6, 7, 11.

Under the Ordinance No. 11 of 1865 "journeyman artificers" mean all skilled workmen in the regular employment of an employer, who are in law presumed to work by the day or who are engaged for a given time, including those who contract to serve by the month.

A machine-ruler in a printing office who has entered into a contract of monthly service is a journeyman artificer within the meaning of the Ordinance

P. C. Colombo, No. 26,803. CAVE v. WILLIAM 47

Material irregularity.

See FISCAL'S SALE.

Merchandise Marks Ordinance.

Fraudulent marks—Prosecution—Police Court—District Court—Election—Jurisdiction—Ordinance No. 13 *of* 1888, *section* 3, *subsection* 5.

In a prosecution under section 3 of the Merchandise Marks Ordinance, 1888, the police magistrate is *functus officio* the moment the accused elects to be tried by the district court.

P. C. Colombo, No. 31,393. SPICER v. VAYIVAPURI.. 83

Minor, action by.

See CIVIL PROCEDURE, 2.
CIVIL PEOCEDURE, 5.

Mortgage decree.

See REGISTRATION, 4.

Mortgage of land.

See REGISTRATION, 2.
REGISTRATION, 3.
REGISTRATION, 4.

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Mortgage of moveables.

See MOVEABLES, MORTGAGE OF.

Moveables, mortgage of.

1.—*Claim in execution—Right of mortgagee of moveables to claim—" Interest" in the property—Action by unsuccessful claimant—Civil Procedure Code, sections* 243, 244, 245, 246, 247, *and* 352.

A mortgagee of moveables, who is not in possession of the property mortgaged, has no right to claim them when seized under an unsecured creditor's writ so as to prevent a sale thereof in execution, or to bring an action under section 247 of the Code upon his claim being disallowed.

D. C. Ratnapura, No. 225. WIJEYWARDENE v. MAITLAND 7

2.—*Mortgage of moveables—Sale of mortgaged property under unsecured creditor's writ—Preference—Claim—Concurrence—Jurisdiction—Civil Procedure Code, sections* 232, 233, 246, 351, 352.

Section 352 of the Civil Procedure Code, after providing for several decree-holders sharing rateably in proceeds sale of a common debtor's property, enacts that "when any property is sold which is subject to a mortgage or charge, or for any other reason remains subject to a mortgage or charge, notwithstanding the sale, the mortgagee or incumbrancer shall not as such be entitled to share in any proceeds arising from such sale."

Section 232 of the Code lays down the mode of seizure of property deposited in any court and provides for the court determining "any question of title or priority arising between the judgment creditor and any person .... claiming to be interested in such property by virtue of any assignment, attachment or otherwise."

Held, that a specific mortgage of moveables by writing, when the goods are retained by the owner, is not such a mortgage or charge as would continue to attach to the goods after a judicial sale thereof, within the meaning of section 352 of the Code, and that the proceeds of the sale less due charges of sale and fiscal's fees represent the goods as long as they have not been appropriated by an order of court to the execution-creditor.

Held also, that until the proceeds are so appropriated a mortgagee who has obtained judgment on his mortgage may seize the money and have the question of preference determined by the court under the provisions of section 232 of the Code.

D. C. Kurunegala, No. 153—M101. MEERA SAIBO v. MUTTU CHETTY 37

See EXECUTION OF DECREES, 2.
REGISTRATION, 1.

Next friend.

See CIVIL PROCEDURE, 2.
CIVIL PROCEDURE, 5.

Nindagama.

See APPEAL, 1.

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Notice of action.

"Place of abode"—"Agent or attorney in the cause"—Municipal Councils Ordinance, No. 7 of 1887, section 278.

Under section 278 of the Municipal Councils Ordinance, 1887, when the notice of action thereby required is given by a proctor on behalf of the intending plaintiff, it is not necessary that the proctor of the plaintiff in the action, when brought, should be the same as the proctor giving the notice, provided the latter had at the time authority to give such notice.

A notice given by a proctor by means of a letter headed "Colombo" and signed by him as proctor for the party on whose behalf the notice is given—

Held, to be a good notice as stating with reasonable certainty the place of abode of the proctor, as required by the above section.

D. C. Colombo, No. 1,973 C. JAFFERJEE v. THE MUNICIPAL COUNCIL OF COLOMBO .. 27

Nuisance.

See CRIMINAL PROCEDURE, 5.

Ordinances.

No. 3 of 1840.
See GAMING, 2.

No. 12 of 1840, section 8.
See CROWN LAND.

No. 4 of 1841.
See GAMING, 2.

No. 6 of 1847, section 31.
See MARRIAGE.

No. 7 of 1862.
See CRIMINAL LAW, 1.

No. 8 of 1863, section 39.
See REGISTRATION, 2, 3, 4.

No. 10 of 1863.
See WILL, 2.

No. 11 of 1865, sections 5, 6, 7, 11.
See MASTER AND SERVANT.

No. 8 of 1871, sections 2, 3, 7.
See REGISTRATION, 1.

No. 22 of 1871, section 3.
See PRESCRIPTION, 1

————, sections 9, 13.
See PRESCRIPTION, 2.

————, section 11.
See MARRIAGE.

No. 23 of 1871, sections 4, 9, 34, 39.
See STAMP, 2.

No. 17 of 1873, section 16.
See CARRIAGE HIRE.

No. 3 of 1876.
See REGISTRATION, 1.

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No. 10 of 1885, section 44.
See FOREST ORDINANCE.

No. 7 of 1887, section 278.
See NOTICE OF ACTION.

No. 13 of 1888, section 3, sub-section 5.
See MERCHANDISE MARKS ORDINANCE.

No. 3 of 1889, sections 4, 7, 8, 17, 39, 40.
See BUDDHIST TEMPORALITIES ORDINANCE.

No. 17 of 1889, sections 6, 7, 8, 10.
See GAMING, 1, 2.

No. 3 of 1890, schedule B, pt. i.
See STAMP, 1.

————, section 3.
See STAMP, 2.

No. 22 of 1890.
See CRIMINAL PROCEDURE, 1.

No. 12 of 1891, section 39.
See LICENSING ORDINANCE.

No. 14 of 1891, section 17.
See REGISTRATION, 4.

No. 1 of 1892, section 14.
See FOREST ORDINANCE.

Objection ore tenus.

See BUDDHIST ECCLESIASTICAL LAW.

Partition.

See WILL, 2.

Person, arrest of.

See EXECUTION OF DECREES, 1.

Petition of appeal.

See APPEAL, 3.
SUMMARY PROCEDURE ON LIQUID CLAIMS, 4.

Pleading.

1.—*Claim in reconvention—Replication—Non-denial of allegation in the answer—Civil Procedure Code.*

Under the Civil Procedure Code, where a defendant makes a claim in reconvention, the non-denial of the allegations in the answer by a replication does not entitle the defendant to judgment on the counter-claim without evidence, but the court should take such allegations as denied and should try the issue between the parties as regards the counter claim.

D. C. Kegalla, No. 352—L8. FERNANDO v. THE CEYLON TEA PLANTATIONS CO. .. 51

2.—*Claim in execution—Execution-creditor—Plaint—Averments—Subsisting debt—Damages—Civil Procedure Code, section 247.*

In an action under section 247 of the Civil Pro-

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cedure Code by an execution-creditor against a successful claimant, it is incumbent on the plaintiff to aver and prove that at the date of action he holds an unsatisfied money decree as well as that the property he seeks to attach is assets of his debtor liable to be levied thereunder.

D. C. Kalutara, No. 640. PERERA v. ABERAN APPU 24

See APPEAL, 1.
BUDDHIST ECCLESIASTICAL LAW.
PROMISSORY NOTE, 1.

Possession.

See PRESCRIPTION, 1.

Preference and concurrence.

See EXECUTION OF DECREES, 2.
FISCAL'S SALE, 2.
MOVEABLES, MORTGAGE OF, 2.

Prescription.

1.—*Possession—Adverse title—Entry into possession with permission of owner—Ordinance No.* 22 *of* 1871, *section* 3.

A person who has been in possession of land belonging to another for 10 years previous to the institution of an action in terms of section 3 of Ordinance No. 22 of 1871 acquires title by prescription, even though his possession originally commenced with the permission of the owner.

So *held* by BONSER, C. J., and WITHERS, J. (*dissentiente* LAWRIE, J.).

C. R. Batticaloa No. 9,653, Vand. 44, approved and followed.

D. C. Galle, No. 1,757. ANTHONISZ v. CANNON 65

2.—*Commencement of action—Abatement—Interruption of prescription—Action for goods sold and delivered—Part payment—Promise to pay—Ordinance No.* 22 *of* 1871, *sections* 9 *and* 13—*Civil Procedure Code, section* 402.

Part payment of a debt will not take the case out of prescription unless the payment is made under circumstances from which an acknowledgment of the debt and a promise to pay the balance may reasonably be implied.

Plaintiff, having in May, 1891 (when the defendant was absent from Ceylon) commenced an action for the price of goods sold, took no steps to serve the summons out of the jurisdiction, and in 1892 the action was ordered to abate. The defendant having returned to Ceylon, the order of abatement was set aside and summons was served on him.

Held, that under these circumstances the action must be taken to have been commenced, *quoad* the period of limitation, from the date when the order of abatement was set aside.

In the case of a sale of goods, the sale being alleged to have been made on May 11, 1890—

Held, that an action, wherein the plaint was filed on May 11, 1891, was not brought within one year after the debt became due.

C. R. Trincomalie, No. 297. MURUGUPILLAI v. MUTTELINGAM 92

Presumption.

See GAMING, 1.

Privy Council, appeal to.

Matrimonial cases — Divorce — Value— Courts Ordinance, No. 1 *of* 1889, *section* 42—*Civil Procedure Code* 1889, *sections* 625, 781, 783.

In an action by a husband for divorce from his wife on the ground of her adultery with the co-defendants, against whom, however, no damages were claimed, the Supreme Court in appeal dismissed the plaintiff's action.

Held, that, under the Charter of 1833 and the Courts Ordinance 1889, no appeal lay as of right to the Privy Council from the judgment of the Supreme Court.

D. C. Matara, No. 502. LE MESURIER v. LE MESURIER 45

See EXECUTION OF DECREES, 3.

Proctor appearing for another.

See CIVIL PROCEDURE, 4.

Proctor, consent by.

See CIVIL PROCEDURE, 1.

Promissory note.

1.—*Indorsement — Payee suing — Averments in plaint—Pleading.*

In an action by the payee of a promissory note against the maker, the note containing endorsements but no averments being made in the plaint relative thereto—

Held, that it was not incumbent on the plaintiff to aver and prove such endorsements, and that the plaintiff being the actual holder of the note would be presumed to be the holder in due course.

D. C. Colombo, No. C2,704. LETCHIMAN CHETTY v. ARUNASALEM CHETTY .. 52

2.—*Note made by attorney—Form of signature—Bills of Exchange Act,* 1882, *sections* 23, 26.

The defendant Sebo carried on the business of a general shopkeeper by an attorney Gira, to whom she had granted a power authorizing him to make promissory notes in her name and for her for the purposes of the business. Gira for such purposes made and granted to plaintiff a promissory note beginning "I the undersigned promise" and signed in Sinhalese with certain words, translated as "Sebo's attorney Gira".

In an action upon the note—

Held, per LAWRIE and WITHERS, JJ. (*dissentiente* BONSER, C. J.) that the defendant was liable.

Per LAWRIE, J.—On the ground that the signature must be read as "Sebo by her attorney Gira".

Per WITHERS, J.—On the ground that whether or not the note bore the signature of Sebo by procuration was a question of fact, and that the signature sufficiently expressed that Gira subscribed for Sebo.

Per BONSER, C. J. (*dissentientem*).—The note was, within the meaning of the Bills of Exchange Act, 1882, "signed as maker", not by defendant, but by Gira, and the addition to his signature was merely

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of "words describing him as an agent", which did not exempt him from personal liability.

See CONTRACT.
SUMMARY PROCEDURE ON LIQUID CLAIMS, 4.

Public officer.

See EXECUTION OF DECREES, 2.

Querela inofficiosæ donationis.

See MARRIAGE.

Reconvention.

See PLEADING, 1.

Registration.

1.—*Chose in action—Assignment—Moveable property—Claim for money—Deed of gift—Ordinance No.* 8 *of* 1871, *sections* 2, 3, 7—*Ordinance No.* 3 *of* 1876 —*Land Acquisition.*

"Moveable property" in sections 2 and 3 of the Ordinance No. 8 of 1871, which requires assignments thereof in writing to be registered, means only corporeal things in possession, and does not include a claim or right to demand money, which is a *chose in action* within the meaning of section 7, and an assignment of which, therefore, need not be registered under the Ordinance.

D. C. Colombo (Crown Case), No. 2,107. DAWSON v. VAN GEYZEL 35

2.—*Registration of titles—Registered mortgage—Subsequent sale by mortgagor registered—Purchase in execution of decree to enforce mortgage—Priority—Ordinance No.* 8 *of* 1863, *section* 39.

The owner of land mortgaged it in 1878, and pending the mortgage sold and conveyed it to defendant in January, 1880. The mortgage was registered in June, 1880, and the conveyance in August, 1880. In 1882 the mortgagee brought against the mortgagor an action (to which defendant was not a party) to realise the mortgage, and obtained a decree in June, 1882, in execution of which he purchased the land himself in October, 1882, and having obtaned a fiscal's conveyance dated December, 1889, sold and conveyed the land to plaintiff, who now sued defendant in ejectment.

Held, affirming the decision of the district court, that plaintiff had no title to the land as against the defendant.

D. C. Matara, No. 633. ABEYAGOONEWARDENE v. ANDRISAPPOO 71

3.—*Mortgage—Sale of mortgaged property pending mortgage—Subsequent sale under judgment on mortgage—First purchaser not joined—Title—Priority—Registration.*

The owner of certain land mortgaged it in January, 1882, and the mortgage was at once registered. In November, 1882, the mortgagor's right, title, and interest in the land were sold in execution of a simple money decree against him and purchased by defendant, who obtained a fiscal's conveyance dated April, 1883, registered in May, 1883, and entered into possession. The mortgagee, thereafter, in a suit to which defendant was not a party, obtained against the mortgagor a decree on his mortgage, and caused the fiscal to sell the land, when plaintiff became the purchaser, and obtained a fiscal's transfer dated September, 1884, which was not registered.

In an action of ejectment by plaintiff against defendant—

Held, that defendant had the superior title.

D. C. Galle, No. 2,076. UNGO APPU v. BABUWE 76

4.—*Title to land—Mortgage—Competition between purchaser under ordinary decree and subsequent purchaser under mortgage decree—Mortgage decree, requisites of—Registration—Land Acquisition—Ordinances No.* 8 *of* 1863, *section* 39, *and No.* 14 *of* 1891, *section* 17.

In 1877 the owner of certain land mortgaged it by an instrument duly registered. The mortgagee, in 1882, obtained a mortgage decree (unregistered), but execution was not enforced until 1893, when the land was purchased by appellant, who registered his conveyance in November, 1893. Meanwhile, in 1890, the land was sold in execution of an ordinary money decree against the mortgagor and purchased by the respondents, whose conveyance was registered on March 3, 1892.

In a contest as to title to the land between appellant and respondents—

Held, that the appellant could not refer his purchase back to the mortgage so as to gain priority over the intervening conveyance to respondents, because the mortgage was merged in the mortgage decree, and the competition therefore lay between the mortgage decree, declaring the land executable for the judgment debt, and the conveyance of the land to the respondents, which was not expressly subject to that debt; and that the decree, being unregistered, was void as against the registered conveyance.

Per LAWRIE, J.—A mortgage decree, in order to affect subsequent purchasers, should be as specific as the mortgage of which it comes in place. It should specify and describe the property declared executable so as to identify it with reasonable certainty. The present decree was ineffectual for not complying with these requisites.

Even if the mortgage decree were valid as against the respondents, they had, before it was enforced, become the lawful owners of the land by a registered conveyance, and in view of the long lapse of time between decree and execution they were entitled to notice before the land could be sold over their heads.

D. C. Galle, No. 2,205. THE GOVERNMENT AGENT v. HENDRICK HAMY 86

Replication.

See PLEADING, 1.

Revision.

See CRIMINAL PROCEDURE, 3.

Sale in execution.

See FISCAL'S SALE.

Service of summons.

See SUMMARY PROCEDURE ON LIQUID CLAIMS, 2.

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Sisyanu Sisya-paramparawe.

See BUDDHIST ECCLESIASTICAL LAW.

Stamp.

1.—"*I. O. U.*"—*Stamp—Acknowledgment of debt—Ordinance No.* 3 *of* 1890, *Schedule* B, *Part* 1.

Under Ordinance No. 3 of 1890, Schedule B, Part 1, "an acknowledgment of a debt exceeding Rs. 20 in amount or value, written or signed by or on behalf of a debtor, in order to supply evidence of such debt .... on a separate piece of paper when such .... paper is left in the creditor's possession," is liable to a duty of 5 cents.

A writing, signed by a debtor and given to the creditor, and unstamped, ran as follows: "I owe you (Rs. 60) sixty only to settle Mr. Mendis' acct. to the end of last August."

Held, that the document did not come within the operation of the above provision, and was therefore not liable to stamp duty and was admissible as evidence of an account stated.

C. R. Avisawella, No. 2,577. ODRIS v. PIRIES 14

2.—*Promissory note*—"*Insufficiently stamped*"—"*Duly stamped*"—*Cancellation of stamp—Construction—Ordinance No.* 23 *of* 1871, *sections* 4, 9, 34, 39—*Ordinance No.* 3 *of* 1890, *section* 3.

Under the provisions of the Stamp Ordinance, 1871, a promissory note, which is not "duly stamped" by reason of the stamp being uncancelled though of the proper value, may be received in evidence at the trial, under section 39, upon payment of the prescribed penalty, the procedure laid down in that section not being limited to instruments bearing either no stamp at all or a stamp of deficient value.

D. C. Colombo, Nos. 1,686, 1,687, 1,759. THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, & CHINA v. SADAYAPPA CHETTY 53

Summary procedure on liquid claims.

1.—*Leave to appear and defend—Appearance—Objection to procedure—Civil Procedure Code, Chapter* liii.

In actions under Chapter liii. of the Civil Procedure Code the defendant cannot be heard or allowed to take any objection as to the regularity of the procedure without having first obtained the leave of the court to appear and defend.

D. C. Galle, No. 1,545. CARPEN CHETTY v. MAMLAN 11

2.—*Leave to appear and defend—Objection as to regularity of procedure—Service of summons, insufficiency of—Civil Procedure Code, Chapter* liii.

In an action under Chapter liii. of the Civil Procedure Code—

Held (following *D. C. Galle*, No. 1,545, 3 C. L. R. 11) that, before the defendant can be heard to object to the procedure, he must obtain leave of court to appear and defend.

Held, per WITHERS, J., that, where there has been insufficient service of summons on a defendant, such irregularity is cured by his appearance, and that if the service of summons is insufficient the defendant need not appear but should, if judgment is signed upon irregular service, apply then to have the judgment set aside.

D. C. Batticaloa, No. 795. MATHAR SAIBO v. CROWTHER 31

3.—*Action on foreign judgment—Civil Procedure Code, sections* 42, 49, 55, 92, *and Chapter* liii.

An action on a foreign judgment cannot be brought under the provisions of Chapter liii. of the Civil Procedure Code, entitled "of Summary Procedure on Liquid Claims".

If in an action under this Chapter the plaint and summons are not in accordance with the forms indicated in section 703, a decree in default, under section 704, would be set aside on due application after notice; but the more prudent course for a defendant served with a summons under this Chapter, if advised that the plaint and summons did not disclose a case appropriate to the Chapter, would be to move the court on notice for leave to appear and apply that the order allowing that special kind of summons to issue should be discharged.

D. C. Batticaloa, No. 827. MEERAPULLAILEBBE v. NOOHOOLEBBE.. 32

4.—*Promissory note—Joint payees and plaintiffs—Affidavit by one plaintiff alone—Civil Procedure Code, section* 705—*Appeal—Petition of appeal "taken down" by secretary—Civil Procedure Code, section* 755.

Section 705 of the Civil Procedure Code requires, in the summary procedure on liquid claims, that "the plaintiff must on presenting the plaint produce to the court the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon."

In an action by two joint payees of a promissory note against the makers, the affidavit was made by one of the plaintiffs alone.

Held, affirming the order of the district court, that the affidavit was insufficient.

A petition of appeal was signed by the appellants alone (who had appeared by proctor in the court below) and bore the following certificate under the hand of the secretary of the court:—"The appellants appear before me and state their wish to appeal in person as their proctor is laid up ill at Colombo. They also submit the grounds of appeal in writing, being the draft of a petition of appeal settled by an advocate, which are embodied in the form of a petition of appeal and signed by the appellants before me."

Held (BROWNE, J., dissenting), that this petition complied with the requirements of section 755 of the Code.

D. C. Chilaw, No. 581. VENGADASALAM CHETTY v. RAWTER 39

Title to land.

See ADMINISTRATION, 2.
REGISTRATION.

Vesting, time of.

See WILL, 1.

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See BUDDHIST ECCLESIASTICAL LAW.

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Will.

1.—*Joint will—Husband and wife*—Fidei-commissum—*Life-interest—Devise—Time of Resting—Surviving spouse—Construction.*

A joint will of husband and wife provided as follows:—"The testators declared to nominate and institute as the heirs to their joint estate their children, George, Cornelia Wilhelmina, and John Charles, together with such other child or children as may be hereafter born of their present marriage, upon the condition, however, that all the joint estate and property belonging to the testators shall be held, possessed, and enjoyed by the survivor of them until his or her life, and that after the death of the survivor the said joint estate and property shall be inherited by their children in equal shares, the shares of any of the children who may predecease the testators to be inherited by their issue by representation."

Held, that the devise in favour of the children took effect only on the death of the survivor of the testators and the property devised vested in only such of the children or their issue as were alive at that date.

Two of the children mentioned having predeceased both the testators without issue—

Held, that the devise failed as to two-thirds of the property, as to which there was therefore an intestacy, and the same devolved on the next of kin as at the date of the death of the surviving testator.

D. C. Colombo (Special). No. 84. OMER LEBBE MARCAR v. EBERT 5

2.—Fidei-commissum—*Estate for life—Absolute interest—Construction—Husband and wife—Partition.*

A joint will of husband and wife, after appointing the survivor the sole heir or heiress of the joint estate, contained the following proviso: "Provided always that in the event of me [the husband] predeceasing my said wife she shall only have a life interest in the said moveable and immoveable property of the joint estate, except moneys laid out at interest, of all which she shall have full free and absolute control." There was no ultimate devise to any person.

Held, that under the above will the wife, who survived the husband, took an estate for life only.

D. C. Colombo, No. 2,741C. NUGARA v. NUGARA 35

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3.—Fidei-commissum— *Will — Construction—Devise to devisee "and his lawful issues".*

A testator devied a house to K. for her life, providing that "at her death the same shall revert to my grandson R. and to his lawful issues, but neither the said R. nor his said children shall sell, mortgage, nor in any manner alienate the same; but if the said R. happen to die without any lawful issue, in that case the property shall revert to the children of A." K. having died leaving her surviving R. and his two children—

Held, that this was an institution of R.'s issues or children as successive and subsidiary to their parent, and not an institution of parent and children as co-heirs, and that therefore the children took no interest until after R.'s death.

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Words.

"Adverse title."

See PRESCRIPTION, 1.

"Chose in action."

See REGISTRATION, 1.

"Forest Produce."

See FOREST ORDINANCE.

"Interest."

See MOVEABLES, MORTGAGE OF, 1.

"Issue."

See WILL, 3.

"Journeyman artificer."

See MASTER AND SERVANT.

"Party interested."

See FISCAL'S SALE.

"Place of abode."

See NOTICE OF ACTION.

"Property deposited."

See EXECUTION OF DECREES, 2.

"Sum awarded."

See EXECUTION OF DECREES, 1.

THE

CEYLON LAW REPORTS,

BEING

REPORTS OF CASES DECIDED

BY THE SUPREME COURT OF CEYLON.

Edited by

H. L. Wendt, Advocate.

T. E. De Sampayo, Advocate.

F. M. de Saram, Advocate.

Present:—Withers, J.

(*August* 3 *and* 7, 1893.)

P. C. Colombo, (Additional) No. 4,821. } Jonklaas v. Perera.

Gaming—Common gaming place—Private house—Entry by police—Presumption—Evidence—Ordinance No. 17 of 1889, sections 6, 7, 8, and 10—Criminal Procedure Code, Chapter V.

Section 10 of Ordinance No. 17 of 1889 provides: "If any instruments or appliances for gaming are found in any place entered under this Ordinance.........or if persons are seen or heard to escape therefrom on the approach or entry of any magistrate, police officer, or person authorised to search such place.........it shall be presumed, until the contrary is proved, that the place is a common gaming place."

Held that the entry contemplated by the above section is that provided for by sections 7 and 8 of the Ordinance under which alone a private house can be visited or searched, and that therefore the presumption that a private house, in which gaming instruments are found, or from which persons are seen to escape, on the entry of a police officer, is a common gaming place, does not arise, unless the entry has been made under a warrant issued by a magistrate under section 7 of the Ordinance.

The defendants were charged with unlawful gaming under section 4 of Ordinance No. 17 of 1889. The evidence was to the effect that certain police officers entered a house, in which they suspected gaming to be carried on, and found a number of men, among whom were the defendants, seated in a certain circle and betting. A dice box and some dice and money were found on the ground. Some of the men escaped on the entry of the police, and the defendants were then and there arrested. The house was admittedly a private house, and the police were not authorised by any warrant to enter or search the place.

The magistrate acquitted the defendants on the ground, among others, that the house was not proved to be a common gaming place within the meaning of the Ordinance.

The Solicitor-General appealed.

Ramanathan, S.-G., contended that the facts established raised the presumption under section 10 of the Ordinance that the house was a common gaming place. [Withers J. drew attention to the words "entered under this Ordinance."] That requirement was fulfilled in this instance. Section 6 authorised police officers to arrest any person committing the offence of unlawful gaming, and Chapter V of the Criminal Procedure Code empowered such officers to enter private houses to effect an arrest. Therefore, it was submitted, the entry here must be taken to be that authorised by the Ordinance. Section 10 must be so construed as to make the Ordinance workable, which would not be the case, if the police could enter only under a warrant.

Sampayo, for the defendants, submitted that section 10 must be read with sections 7 and 8 of the Ordinance, and unless a police officer obtained a warrant he could not enter a private house so as to give rise to the presumption under section 10. As to section 6, the authority given there to arrest was

only where a person was found committing the offence of unlawful gaming, and in this instance there could be no unlawful gaming unless the house was a common gaming place. The very question here being whether the house was a common gaming place, the contention based upon section 6 of the Ordinance and Chapter V of the Criminal Procedure Code was merely an argument in a circle. An Ordinance like this, creating artificial offences, should be strictly construed.

Cur. adv. vult.

On August 7, 1893, the following judgment was delivered :—

WITHERS, J.—The accused have been acquitted of an offence charged against them under the Gaming Ordinance No. 17 of 1889. The Solicitor-General appeals from that acquittal.

The house, in which certain instruments for gaming were seized and in which the accused were arrested for unlawfully gaming there, being admittedly a private house, it was incumbent on the prosecution to prove that the house was a common gaming place. It was argued by Mr. Solicitor that reading the Ordinance No. 17 of 1889 in connection with Chapter V of the Criminal Procedure Code, the discovery by the police witnesses of instruments for gaming inside the house and the escape therefrom of persons found and seen therein on the entry of those officers for the purpose of arresting any one betting or playing a game there for a stake, constituted a presumption under the Gaming Ordinance, unless the contrary was proved, that the house was a common gaming place, and that the persons found in it were guilty of unlawful gaming.

Having had frequent occasion to read and interpret this Ordinance, I entertain no doubt that such presumption can only arise when persons or instruments for gaming are found in a place visited by the police magistrate himself under the provisions of section 8 of the Gaming Ordinance, or by a police officer (or other person named therein) under a warrant issued by a police magistrate under the provisions of section 7 of that Ordinance.

As I read the Ordinance, it was the intention of the Legislature that the police magistrate should visit a private house under the Gaming Ordinance, or issue his warrant to a police officer or other person to visit and search a private house, only in the circumstances mentioned in sections 7 and 8 of that Ordinance respectively, he himself being entitled to visit it in the cases stated under section 8 as well as under section 7.

For these reasons I think that the judgment of acquittal in this case is a right one.

Affirmed.

Present :—LAWRIE, A. C. J.

(*July* 6 *and* 13, 1893.)

P. C. Panadure, No. 8,816. } PERERA v. SADIRAPPU.

Gaming—Games of chance—Playing for a stake—Ordinance No. 3 *of* 1840—*Ordinance No.* 4 *of* 1841—*Ordinance No.* 17 *of* 1889.

To constitute the offence of unlawful gaming under the Ordinance No. 17 of 1889, it is essential that the gaming should be for a stake.

The accused were charged under the Ordinance No. 17 of 1889 with keeping a common gaming place and with unlawful gaming. The evidence established the fact that the accused were seen sitting round a room, and one was shaking a box with dice in it. The police magistrate convicted the defendants. The first defendant appealed.

There was no appearance of counsel upon the appeal.

Cur. adv. vult.

On July 13, 1893, the following judgment was delivered :—

LAWRIE, A. C. J. The conviction in this case shows that it is again necessary to explain what games the Legislature of Ceylon has declared illegal. Before referring to the Ordinances passed on this subject it may be worth while to remember what the common law of England is as to gaming. Russell on Crimes Vol. I, page 608, states, "By the English "common law the playing at cards, dice, etc., when "practised innocently and as a recreation, the better "to fit a person for business, is not at all unlawful "or punishable as any sort of offence." I do not know if, by Roman-Dutch Law, there was any punishment attached to gaming in Ceylon prior to the passing of the Ordinance No. 3 of 1834, but by that Ordinance the Legislature prohibited the playing at any game of chance; and Ordinances No. 3 of 1840 and No. 4 of 1841 prohibited gaming with any table, dice, cards or any other instruments of gaming at any game or pretended game of chance. For the ensuing fifty years the law prohibited merely playing at games of chance. The Ordinance said nothing about the losing or winning of money. That was not the essence of the offence. Chance was what made a game unlawful.

In 1889, the Legislature abandoned the theory that to play a game of chance was wrong; and, in lieu of that, it prohibited playing a game for a stake. Where this idea came from I do not know; it was not derived from India, because in the Indian Gaming Act of 1867 it is enacted that it shall not be neces-

sary, in order to convict any person for keeping a common gaming house etc., to prove that any person, playing at any game, was playing for any "money wager or stake." Notwithstanding the change made by the Ordinance No. 17 of 1889, there still lingers in the minds of most police magistrates the belief that the law prohibits games of chance and that all that needs to be proved is that a bamboo or dice were used by those playing the game, but that is an erroneous belief.

The law now is that games of chance are lawful. It is permitted to throw the dice and to play a game of chance, provided there be no stake. Playing for a stake, the possession of which is to depend on the throw of the dice as the result of the game, is alone prohibited.

Here, in the case before me, the accused were found in a house throwing dice ; there is no evidence that there was any stake. They are therefore not proved to have broken the law of gaming and of keeping a common gaming place. The convictions are set aside and the accused are acquitted.

Set aside.

———: o :———

Present :—LAWRIE, A. C. J., and WITHERS, J.

(*July* 7 *and* 11, 1893.)

D. C. Colombo, No. 3,085 C. } PERERA V. FERNANDO.

Administration—Action by creditor of decedent—"Administrator's year"—Plea in bar—Civil Procedure Code, Chapters xxxviii *and* lv, *and sections* 720, 721, 725.

The creditor of a deceased person is entitled to maintain an action for his debt against the latter's executor or administrator immediately after grant of probate or letters, and there is no law either in the Civil Procedure Code or elsewhere which postpones his right of action until a year has expired from such grant.

The plaintiff on September 7, 1892, commenced this action again t the defendant as administrator of C. Mathew (who had died on March 4, 1892) to recover the value of goods sold and delivered to Mathew, and a sum of money paid for him at his request. The defendant admitted the debt, and pleaded that before action he had promised to pay the same when the proper time arrived for distributing the assets of the intestate, which time had not yet arrived, and plaintiff had no right to maintain this action inasmuch as letters of administration had been granted to defendant only on April 25, 1892, and one year from that date had not expired, and plaintiff had no right to embarrass the defendant in the administration by commencing and maintaining this action. He prayed for dismissal of the action. The district judge, on December 22, 1892, dismissed the action with costs, holding that, as there was no denial of liability by defendant, there was practically no cause of action or issue of fact raised such as would justify legal proceedings against defendant before expiration of the year allowed him for the settlement of the intestate's estate. Prescription would not run against plaintiff, and from the general tenor of the provisions of the Code relating to administrators it appeared to the court to be the intention of the law to place a year at their disposal for the settlement of accounts, and within that period to protect the estate from the effects of unnecessary litigation.

The plaintiff appealed.

Wendt, for the appellant. There is no warrant for the position that no action can be maintained against an administrator until after the lapse of a year from grant of letters. [He was stopped.]

Dornhorst (*VanLangenberg* with him) for the defendant. The proper order, it is submitted, ought to have been a stay of proceedings until the administrator's year was over. The Civil Procedure Code leaves an executor or administrator undisturbed for a year (section 737, and compare 22 and 23 Car. ii. c. 10, s. 8.) No cause of action accrues to a creditor against an executor or administrator until default is made in payment and that can only be after the expiration of a year. [LAWRIE, A.C.J.,—Does not section 553 of the Code mean that an executor or administrator should be busy during the first twelve months in paying debts ?] It is submitted that the object of the law was to allow a year to enable an executor or administrator to pay off all moneys, and the operation of the statute of limitations is suspended till after the expiration of a year. If administration is not taken out for several years, a creditor can come in and apply ; but if a creditor chooses to lie by and not take out administration, he will have no one to blame but himself. [LAWRIE, A.C.J.,—What about a legatee suing ?] A legatee's right to his legacy depends on the executor's assent to the legacy. But under section 725, a legatee can come in after a year has expired since grant of probate and pray for a judicial settlement of the executor's accounts. [WITHERS, J.—Legacies are subject to debts.] Yes ; the executor's assent being necessary to enable a legatee to sue, it is submitted that the executor cannot give his assent until he knows how much is available for distribution, and for this purpose the Code has allowed him a year to collect the assets and do what he otherwise could not do. [LAWRIE, A.C.J., referred to sections 720 *et seq.*]

These sections of the Code worked important changes in our administration law.

Wendt, in reply.—The provision of the statute of Charles II relied on was enacted expressly in the interest of creditors, and abridged none of their rights. It deals with *distributions* to legatees and parties entitled to a share of the estate, and not with debts due by the estate. Section 737 of the Code only suspends the statute of limitations in respect of causes of action between the deceased and the administrator. A creditor, like the present plaintiff, whose claim is barred in one year, would find his right of action gone altogether if he waited till the "administrator's year" had elapsed.

Cur. adv. vult.

On July 11, 1893, the following judgments were delivered :—

Lawrie, A. C. J.—When a debtor dies intestate those of his creditors whose causes of action survive await with anxiety the grant of letters of administration. The day after these are issued the creditors are entitled to sue the administrator in the same way as they could have sued the debtor had he lived.

The plea that the law protects an administrator from actions to constitute, and to enforce debts due by the intestate—that the law permits the administrator to defy the creditors for a year—is supported neither by common sense nor by common law. If there be indications in our Code of such a protection, these sections shall be strictly construed, but none of them apply to this case.

I would set aside the judgment, and give judgment for the plaintiff with costs, as suggested by my brother Withers.

Withers, J.—For the first time, I imagine, has been raised on behalf of an administrator, in resistance to an admittedly just claim by a creditor against the estate of a deceased debtor, which is sought to be enforced by action, this very curious plea : "My year has not yet run out and you must not worry me with your claim until that year has expired." Whether the plea was a serious one or not, it has been seriously upheld by the court below.

Mr. Dornhorst in support of the judgment contended that the provisions of our Civil Procedure Code with regard to testamentary matters, read as a whole, constitute a law prohibiting a creditor from suing an administrator or executor for a debt due by the decedent till one year has expired from the date of probate or grant of letters ; or, he argued, at all events that a court is competent and is required by these provisions, if read aright, to stay all proceedings in an action of the kind pending the year of grace.

I cannot hold with this contention for a single moment. I require to see some law expressed in the clearest possible terms which destroys the creditor's undoubted right to sue an administrator or executor within a year from the date of probate or grant of letters for a debt which the deceased owed him when he died. As this objection, however, has been taken, I feel bound to say a few words with regard to the provisions of the Code which are supposed to legislate to this effect by way of implication. Chapter xxxviii of the Civil Procedure Code may be said to enact rules of procedure for the probate side of our district court. It provides more particularly for the production and proof of wills, applications for probate and letters of administration, grants of probate and letters of administration, revocation of probate or letters, the duties of executors and administrators, compensation for services rendered by them, and the time when their accounts are to be filed. An executor or administrator has one year allowed him, from the date of his grant to administer a dead man's estate, by or before which time he must file a true account of his administration. Chapter lv provides for compelling intermediate accounts before the year has expired and compelling final accounts, now called judicial settlements, after the year has expired, or after the revocation of grant or cessation of a grantee's functions. An executor or administrator may on his part, after his year is out, apply for a judicial settlement of his accounts. The object of the judicial settlement is to bring the administration to a close, and the effect of it is to conclude all parties cited to attend the proceedings and their privies in estate with regard to certain facts connected with the administration, *e.g.* the correctness of items allowed to the accounting party for payments made by him (*n. b.*) to *creditors*, legatees, heirs, and next of kin ; also items allowed for necessary expenses incurred by him and for services rendered by him, for interest charged against him, for money collected by him, for allowances made for decrease or increase of wasting or productive assets. Hence a judicial settlement is of great advantage to an executor or administrator. It further enables him to prove and retain debts which the deceased incurred to him. It is further a mutual advantage to the estate and the executor or administrator, in that as regards mutual debts, that is, debts due from him to the estate or *vice versâ*, the operation of the statute of limitations is suspended b.-

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tween the date of the death of the deceased and that of the first judicial settlement. (See sec. 737 of the Civil Procedure Code.)

Counsel's contention really amounts to this, that a creditor whose debt an executor or administrator refuses to pay has no remedy open to him except to press for a judicial settlement or defer his claim by action till a year from probate or grant has expired, when meanwhile he may have lost his remedy by the statute of limitations.

It is, as it ever was, the duty of an executor or administrator to pay a creditor's admitted claim the moment it is demanded, if he has the wherewithal to pay it and no preferential claim stands in the way. Indeed, if he can do so, and does not do so, within his year, he is liable by our Civil Procedure Code (sec. 554) to pay interest out of his own funds for all sums which he shall retain in his own hands after that period, unless he can show good and sufficient cause for such detention.

I would set aside the judgment, and give judgment for plaintiff against the administrator for the sum claimed, with costs to be levied against the administrator personally in the event of there being insufficient assets of the deceased, C. Mathew, out of which to levy them.

Set aside.

———:o:———

Present:—LAWRIE, A. C. J., & WITHERS J.

(*May* 19 *and* 23, 1893.)

D.C., Colombo, (Special) No. 84. } OMER LEBBE MARCAR v. EBERT.

Joint will—Husband and wife—Fidei commissum—Life interest—Devise—Time of vesting—Surviving spouse—Construction.

A joint will of husband and wife provided as follows:— "The testators declared to nominate and institute as the heirs to their joint estate their children, George, Cornelia Wilhelmina, and John Charles, together with such other child or children as may be hereafter born of their present marriage, upon the condition, however, that all the joint estate and property belonging to the testators shall be held, possessed, and enjoyed by the survivor of them until his or her life, and that after the death of the survivor the said joint estate and property shall be inherited by their children in equal shares, the shares of any of the children who may predecease the testators to be inherited by their issue by representation."

Held, that the devise in favour of the children took effect only on the death of the survivor of the testators, and the property devised vested in only such of the children or their issue as were alive at that date.

Two of the children mentioned having predeceased both the testators without issue—

Held, that the devise failed as to two-thirds of the property, as to which there was therefore an intestacy, and the same devolved on the next of kin as at the date of the death of the surviving testator.

Mathys Freywer and his wife Catherine Nicolle made their joint last will, dated November 12, 1852, whereby they disposed of their joint estate in the manner above stated. The testators had no other children than those mentioned in the will. Two of the children mentioned in the will, viz., George and John Charles, predeceased both the testators, intestate and unmarried. The third child, Cornelia Wilhelmina, who was married to Robert Brohier, also predeceased both the testators in 1861, but left her surviving five children, viz.—(1) William Brohier, (2) James Hope Brohier, (3) Jemima Caroline Brohier, (4) Frances Matilda Brohier, and (5) Hannah Louisa Brohier, who where all living at the date of the death of the testator Mathys Freywer in October, 1863. The testatrix, Catherine Nicolle, who proved the will and accepted benefit thereunder, died in August, 1883. Of the said five children of Cornelia Wilhelmina, James Hope Brohier predeceased the testatrix Catherine Nicolle in June, 1881, intestate, and leaving him surviving his wife Jane Vandort and two minor children, (1) Jane Catherine and (2) James Hope. Jemima Caroline Brohier, who was married to Dr. Edward Nathaniel Schokman, also predeceased the testatrix in January, 1882, intestate, and leaving her surviving her husband Dr. Schokman and four minor children, (1) Samuel Nathaniel, (2) Emmelina Florence, (3) Grace Claribel, and (4) Hector Macleod.

Under writ of execution issued against the said William Brohier an undivided one-fifth of certain premises belonging to the joint estate of the said Mathys Freywer and Catherine Nicolle was seized in June, 1885, and sold to John Carl Fernando, who subsequently died leaving a will by which he appointed his son Peter Fernando his executor.

Upon application to the District Court of Colombo, Mrs. James Hope Brohier was appointed guardian over her two minor children with power to sell an undivided one-tenth of the said premises to which the said children were alleged to be entitled, and Dr. Schokman was appointed guardian over his four children with power to sell an undivided one-tenth of the said premises to which the said children were alleged to be entitled.

In December, 1889, the said premises were put up for sale by public auction at the instance of the said Frances Matilda Brohier (who was married to Henry Justin Ebert), Hannah Brohier, Mrs. James Hope Brohier for herself and as guardian of her minor children, Dr. Schokman for himself and as guardian of his four minor children, and Peter Fernando, the executor of John Carl Fernando deceased, and were purchased by Omer Lebbe Marcar. The purchaser paid over the deposit required under the conditions of sale, but refused to pay the balance purchase money or to

accept a conveyance on the footing of the sale, on the ground that the devise under the said will took effect only on the death of the surviving testatrix Catherine Nicolle, that therefore Mrs. James Hope Brohier, Dr. Schokman, and John Carl Fernando had no interest to convey, that the minor children respectively of Mrs. James Hope Brohier and Dr. Schokman were entitled not to one-tenth, which only their guardians had authority to sell, but to one-fifth, and that therefore the parties at whose instance the auction sale was held had not the title which they purported to sell. The executor of John Carl Fernando, however, after the auction sale, obtained a fresh conveyance from William Brohier.

Upon this state of facts the parties agreed to submit a special case for the decision of the District Court under the provisions of chapt. lii. of the Civil Procedure Code. The learned District Judge decided against the purchaser, holding that the property vested and the will began to speak on the death of the first dying testator Mathys Freywer.

The purchaser appealed.

Layard, A. G. (*Sampayo* and *VanLangenberg* with him) for the appellant. It is submitted that the devise vested only on the death of the last dying testator. The words of the will are clear—"after the death of the survivor," and the property is then to be "inherited" by the children, the shares of the children who may predecease the survivor being "inherited" by their issue. The devise was not intended to vest, and did not in law vest, until the death of the testatrix. See *D. C. Colombo*, No. 2,910, 9 S. C. C. 101 ; *D. C. Galle*, No. 91,611, Vand. 204. Therefore, James Hope Brohier and Jemima Brohier having predeceased the testatrix, the respondents Mrs. James Hope Brohier and Dr. Schokman took nothing, and the shares of their children were not one-tenth, but one-fifth, which their guardians have as yet no authority to sell. In any event, a joint will amounts virtually to two wills, one speaking from the death of one testator and the other from the death of the other, and therefore only half the property would vest on the death of the first dying and the other half on the death of the other. (*Dias* v. *Livera*, L. R. 5 App. Cas. 123.) So that Mrs. James Hope Brohier and Dr. Schokman in any point of view had not the shares which they professed to sell, nor had they authority as guardians to sell the whole interest of the minors. It is submitted that the purchaser appellant should have succeeded on the issues submitted for decision.

Dornhorst (*Wendt* with him) forth the first ten respondents. It is submitted that the will began to speak from the death of the first dying spouse. The test is, whether the surviving spouse could have revoked the will so as to defeat the ultimate devise to the children and their issue. She could not do so, as she had acted under the will and taken benefit thereunder. (*Denyssen* v. *Mostert*, L. R. 4., P. C. 236 ; *D. C. Colombo*, No. 56,179, Vand. 112.) The will therefore took effect on the death of the first spouse, and the property then vested in all the children of Cornelia Wilhelmina, though possession was postponed until the death of the surviving spouse. The survivor having admittedly only a life interest, in whom was the fee or *dominium*, unless it was in the devisees ? The cases cited from 9 S. C. C. 101 and Vand. 204, even if correctly decided, are distinguishable, because there the survivor was expressly nominated as heir with a restriction against alienation in favour of the children. Here the children were directly made heirs, subject to a right of possession during life, by the surviving testator, and this alters the whole case. The word "inherited", upon which much stress was laid by the other side, is surplusage and meaningless, and the will ought to be so construed as to give effect to the testators' intention. The word must be taken to be loosely used, as the children had already been "nominated heirs", and to mean the effects of inheritance, *i.e.*, possession, which they were to get only on the death of the surviving testator. Further, this construction was put upon this very will in *D. C. Colombo*, No. 77,650, 2 S. C. C. 194. [He also cited *D. C. Colombo*, No. 92,237, *D. C. Colombo*, No. 94,982, and *D. C. Colombo*, (*Testamentary*) No. 2,842, all which he contended were decided on the footing of this construction of the will.]

Morgan (*Seneviratne* with him) for the eleventh respondent, relied on the argument of counsel for the other respondents.

Layard, A. G., in reply. The construction of this will was not directly before the Court in any of the cases cited, and no authoritative construction has yet been put upon it. Take, for instance, the case cited from 2 S. C. C 194. All that it decided was that the surviving testatrix had only a qualified interest in the joint property, which therefore could not be sold absolutely under writ against her. That may be correct, but it does not help in deciding as to when the interest of the children vested (which is the question here) and is not inconsistent with the argument that it vested only on the death of the testatrix.

Cur. adv. vult.

On May 23, 1893, the following judgments were delivered :—

WITHERS, J.—If this will had ever been construed by this Court, we should not hesitate to adopt the

construction put upon it by our predecessors; but this appeal would, I am sure, not have been taken, if a decision construing it could be found. The cases cited to us were cited rather as indicating the views of this Court on the matters which came before it incidental to this will; but I heard nothing in argument founded on those cases to satisfy me that this Court had ever inclined to one construction rather than the other.

Viewing the will as *res integra*, we are bound to say that in our opinion the property devised by it vested, on the death of the surviving spouse, in those entitled to succeed to the property. The words, to our minds, speak for themselves, and they are as follows:—"The testators declared to nominate and institute as the heirs to their joint estate their children, George, Cornelia Wilhelmina, and John Charles, together with such other child or children as may be hereafter born of their present marriage, upon the condition, however, that all the joint estate and property belonging to the testators shall be held, possessed, and enjoyed by the survivor of them until his or her life, and that after the death of the survivor the said joint estate and property shall be inherited by their children in equal shares, the share of any of the children who may predecease the testators to be inherited by their issue by representation."

We take this, in effect, to be a mutual will, leaving a life interest to the surviving spouse, with remainder to the nominated children, George, Cornelia Wilhelmina, and John Charles Freywer, in equal shares, with inheritance to their issue in representation. Mark the words "and that *after the death of the survivor* the said joint estate shall be inherited by their children," &c.

The shares of George and John Charles lapsed, as they predeceased their parents. As to their shares, there was an intestacy. In other words, two-thirds of the joint estate were undisposed of by the will. That devolves on the next of kin at the date of the death of the testatrix, whoever they may be found to be.

The issue representing the nominated heir, Cornelia Wilhelmina Freywer, are William Brohier, Hannah Louisa Brohier, Mrs. Ebert (*nee* Frances Matilda Brohier), James Hope Brohier's children, and Mrs. Schokman's (*nee* Jemima Caroline Brohier) children.

James Hope Brohier having predeceased the testatrix, his wife took nothing by the will. Mrs. Schokman having predeceased the testatrix, her husband took nothing by the will.

Our finding against the interests of Mrs. J. H. Brohier and Mr. Schokman is an answer favourable to the enquiring purchaser in the special case.

We are not called upon to decide the shares of the "issue" under the will, or who are the next of kin at the death of the testatrix. Indeed we have no sufficient material for determining the latter question. Our answer must be limited to the simple statement, that Mrs. James Hope Brohier and Mr. Schokman have no disposable interest in the joint estate *under the will* as spouses, that is, of certain of the issue of Cornelia Wilhelmina Freywer. The purchaser, having succeeded on the main question, is entitled to his costs in both courts.

LARWIE, A. C. J.—I agree.

Reversed.

——:o:——

Present:—LAWRIE, A. C. J., and WITHERS and BROWNE, JJ.

(*August* 11 *and* 15, 1893.)

D. C. Ratnapura, No. 225. } WIJEYWARDANE v. MAITLAND.

Claim in execution—Mortgagee—Right of mortgagee of moveables to claim—"Interest" in the property—Seizure—Action by unsuccessful claimant—Civil Procedure Code, secs. 243, 244, 245, 246, 247, *and* 352.

A mortgagee of moveables, who is not in possession of the property mortgaged, has no right to claim them when seized under an unsecured creditor's writ so as to prevent a sale thereof in execution, or to bring an action under sec. 247 of the Code upon his claim being disallowed.

Under an indenture entered into by the plaintiff and one Silva, the plaintiff agreed to advance monies to Silva to enable him to fell and remove certain ebony trees, to which Silva had acquired a right; and Silva agreed to sell and deliver the ebony, when cut, to the plaintiff at a certain price, the monies advanced going in payment thereof; and for securing the performance of the agreements on Silva's part, he hypothecated with the plaintiff all the ebony then cut and lying on a certain land, and all that might thereafter be cut. While certain ebony logs, which were the subject of the said indenture, were being removed by Silva to be delivered to the plaintiff, they were seized at the instance of the defendant under writ of execution issued by him for the recovery of a money judgment obtained by him against Silva in another action. The plaintiff thereupon preferred a claim to the ebony, and the claim having been reported to the court in due course, was ultimately disallowed. The plaintiff then brought the present action against the defendant under sec. 247 of the Code.

The plaint after setting out the agreement with

Silva, and the mortgage alleged that the defendant had wrongfully caused the ebony to be seized under his writ, that thereupon the plaintiff duly claimed the said ebony "under and by virtue of the said indenture and the mortgage thereby created, and objected to the seizure or sale thereof in execution of the defendant's said decree," and that the Court having "duly inquired into the said claim and objection" disallowed the same. The plaintiff prayed for a declaration that the said ebony was not liable to be seized under the defendant's writ, for release of the ebony from seizure, and for damages and costs.

The District Judge held that the ebony was rightly seized, and on that ground dismissed the plaintiff's action for damages and costs, but, holding that under sec. 246 of the Code the Court had a discretion to release property which was subject to a mortgage, he ordered the ebony to be released from seizure.

Both parties appealed.

Wendt (*Dornhorst* and *Morgan* with him) for the plaintiff. The judgment of the District Judge, so far as it dismissed the plaintiff's action, is erroneous. The claim was properly made with a view of preventing the sale in execution, and upon its disallowance this action was well brought under sec. 247 of the Code. [Withers, J.—What is the "right" you seek to "establish"?] The right of mortgage, which would otherwise be defeated by the sale. Under the old practice an injunction would be available to a mortgagee. *Whittall* v. *Hardie*, 4 S. C. C. 23; also Wendt, 217. The principle of these decisions was recognised in D. C. Colombo, No. 285, 9 S. C. C. 109. Under the Code the procedure by way of claim is available to secure the right of a mortgagee of moveables. If a sale is not prevented by this means, a mortgagee's right will be altogether defeated, for after delivery upon sale the mortgagee will not be able to follow the property in the hands of the purchaser. See D. C. Kurunegala, No. 7,244, 9 S. C. C. 127; D. C. Jaffna, No. 22,914, 1 S. C. R. 213. The Code contemplates such claims by mortgagees, as sec. 246 provides, that where the property seized is subject to a mortgage or lien, the Court may continue the seizure subject to such mortgage or lien. It is submitted therefore that the plaintiff's action was entitled to succeed.

Sampayo for the defendant. The "right" mentioned in sec. 247 corresponds to "interest" in sec. 243, and means some right of property, and does not include the mere security of a mortgagee. It has been held that the action under sec. 247 is provided for a specific purpose. D. C. Kalutara, No. 626, 2 C. L. R. 191. In the case of a claimant it can only be founded upon some right of property, and be brought for the purpose of setting aside a wrongful claim. The Roman Dutch Law is still our law with regard to hypothec of moveables, and under it the property can always be sold by an unsecured creditor, subject only to mortgagee's right to claim proceeds. A mortgagee cannot stop such sale. *Miller* v. *Young*, *Ramanathan* (1872) p. 23. It is submitted that *Whittall* v. *Hardie* was wrongly decided, as it proceeded upon the principles of the English law as regards bills of sale, which is widely different from our law. That this was so is apparent from the judgment cited from 9 S. C. C. 109, which, while it shows that under English law an injunction would be available, applies the Roman Dutch Law of preference in respect of proceeds. Besides, an injunction is a very different proceeding from a claim in execution. As to the argument *ab inconvenienti*, that the plaintiff's right as mortgagee would be defeated, that is not so, because the proceeds of the sale will stand in the place of the property, and may be claimed in preference. The plaintiff's action is therefore misconceived, and was properly dismissed. The provision of sec. 246 does not avail the other side. No doubt the Court has a discretion under that section, but the alternative is not between selling the property subject to the mortgage and not selling it at all, but between selling it so subject and selling it outright. It is therefore submitted that the order releasing the property from seizure was unwarranted, and the defendant's appeal on that point is entitled to succeed.

Dornhorst in reply. The Roman Dutch Law of concurrence and preference no longer exists in Ceylon. Under sec. 352 of the Code it is only a decree-holder that can claim proceeds D. C. Trincomalee, No. 23,437, 9 S. C. C. 203. This course is not available to the plaintiff, because he has not yet obtained a decree upon his hypothec, and his only remedy therefore is the means he has adopted in this action. Even if a claim is to be restricted to the owner of property, the plaintiff, it is submitted, need not be considered a claimant in that sense. Under the sections of the Code in question a person may not only "claim", but "object". The plaintiff as mortgagee objected to the seizure of the property mortgaged to him, and his objection being rejected he has properly brought the present action.

Cur. adv. vult.

On August 15, 1893, the following judgments were delivered:—

LAWRIE, A. C. J.—I assume that the plaintiff holds a valid mortgage over the ebony. Following the decision of this Court reported in Ramanathan (1872) 23, I am of opinion that the mortgagee has no right to prevent a sale in execution on a judgment against the mortgagor. I am humbly of opinion that the injunction in Whittall's case (4 S. C. C. 23, and Wendt 217) ought not to have been granted.

There is no provision in the Civil Procedure Code which gives a mortgagee a right to prevent a sale in execution of the mortgagor's right, title, and interest in the property mortgaged. In this matter no distinction is drawn between mortgages of moveable and mortgages of immoveable property. We cannot be influenced by considerations, whether the mortgagee will have a preference on the proceeds of the sale. It may be that as the plaintiff holds no judgment on this mortgage, sec. 352 of the Code has taken away the right, which the law, as expounded in the judgment in Wendt 217 and 9 S. C. C. 109, allowed to him.

I give no opinion whether the mortgagee could have obtained or could even now obtain an order under sec. 246. He has not asked that the seizure should be continued and the property sold subject to his mortgage. When such a motion is made, the Court will consider it.

I would set aside the order that the seizure be released. The action must be dismissed with costs.

WITHERS, J.—What is the right to the property in dispute claimed by the plaintiff in this action, and what was the right claimed to the property when first seized, which was the subject of the adverse order giving rise to the present action? These are questions I find it difficult to answer. No right is specified in the plaint as the subject of determination in this action; and as to the right preferred to the Fiscal, and referred by him to the Court, we know no more about it than what is said in para. 7 of the plaint in somewhat ambiguous language. I have no doubt that, under sec. 247 of the Civil Procedure Code, a claimant or objector can only seek to establish in the action thereby permitted to him the very same right to the property under seizure as was the subject of the adverse order, within fourteen days of which he is compelled to take the action allowed him.

The case was argued as if the right claimed in this action was the right of a mortgagee of the timber without possession. By the other side it was contended that no binding contract of mortgage over the timber under seizure was made out by the plaintiff; but, taking that as proved, it was further contended that the right under that contract was not a right that could defeat execution under defendant's writ. What is meant by the words "right to property" in sec. 247 of the Civil Procedure Code? For the meaning we must go to sec. 243, which declares that a claimant or objector must adduce evidence to show that at the date of seizure he had some interest in or was possessed of the property seized. Now, the plaintiff was clearly not in possession of the property seized. Was then his interest in it such as to defeat execution? It surely never was the law before the Civil Procedure Code that mortgaged property could not be seized and sold under a writ of *fi. fa.* for the levy of a money judgment. Has it been altered by the Code? It was contended before us that it was, if not explicitly, at all events implicitly, altered by the provisions of sec. 246 of the Code, in view more particularly of the decisions of this Court, that a mortgagee cannot follow moveables which have passed to a third person under a valid title, and that it is only a decree-holder with a writ out for levy of an unsatisfied judgment who can claim concurrence in the proceeds of the levy under a third party's writ.

Sec. 246 enacts, that if the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the sequestration or seizure, it may do so subject to such mortgage or lien. From these words we are asked to draw this inference—that a Court is bound to release mortgaged property rather than continue the seizure. I admit that the language fairly suggests that contention; but I cannot admit that a radical change in the law can be made giving a new and unheard-of advantage to the conventional mortgagee of property, except by express language or by language which cannot possibly admit of any other construction.

Having regard to the provisions of the two prior secs. 244 and 245, what must guide the Court in considering whether it shall or shall not release property seized at the instance of an objector or claimant is the fact of possession at the date of seizure. If property is in possession of the debtor himself as his own, or in a third party's possession on account of the debtor, the Court shall disallow the claim (sec. 245). If the property is not in the possession of the debtor, or of some one for him as trustee, tenant, or other person paying rent to the debtor, or if the property is in the possession of the debtor but not on his own account or as his own property, but on account of or in trust for some other person, or partly one and partly the other, for the reason stated in

the claim or objection, a reason, that is; by way of "some interest" in the property under seizure, then the Court shall release the property from seizure in whole or in part, as the case may be (sec. 244).

A claimant's interest in or possession of property must be surely such as takes the property out of a writ of *fi. fa.* For example, if a claimant has goods of the debtor under a right of lien, the debtor's interest cannot be seized or sold as long as the claimant's right to keep possession of the goods remains. I apprehend sec. 246 to mean that, in certain special circumstances, which must be considered when they arise, a Court may allow the seizure to remain subject to a mortgage or lien in cases where the claimant is not in actual possession of the property, because he may not have lost his right to possession. I cannot bring myself to think that the Code authorises a Court to release property seized at the instance of a mortgagee who has no right to have the goods mortgaged in his possession.

This being my opinion, it becomes unnecessary to consider the points argued as to ordinary mortgagee's remedies, or the question whether plaintiff had any mortgage right at all. As the removal of the seizure was a remedy consequent only on the plaintiff's establishment of a right to the property, which has failed, the learned Judge was wrong to direct the removal of the seizure, and this part of the judgment must be expunged. With this modification, I would affirm the judgment with costs.

BROWNE, J.—The current of authority in precedents as respects the right of a mortgagee to interfere in the sale of the mortgage by an unsecured creditor runs thus. After the decision in Ledward's case (1 Moore P. C. N. S. 386), that the mortgagee had prior right of payment out of proceeds, the Collective Court (Ramanathan (1872) 24) held that the mortgagee had no right to demand the stoppage of the sale by the execution-creditor. Nine years thereafter Clarence, J., sitting alone (4 S. C. C. 23), allowed an injunction to restrain the sale of a coffee crop when asked to do so by a mortgagee with whom it had been also convenanted by the debtor that the crops should be given to him to be cured and shipped; and in the next year (Wendt 217) Clarence, A. C. J., and Dias, J., held that order was right. It does not appear from the reports whether the judgment reported in Ramanathan was cited in argument; but no doubt the ruling was then made in cases in which there was, as I have said, something more than the mere hypothec granted by the mortgagor. In 1890 (9 S. C. C. 111) Clarence, J., while upholding the right of the mortgagee to the proceeds after sale, again held "the mortgagee has the right to prevent the goods from being sold away from him", though, the goods having been already sold, the right was not then in question. The decisions in 9 S. C. C. 127 and 1 S. C. R. 213 were pronounced in cases in which the mortgagor had sold the moveable property before the mortgagee took any action, and leave untouched the questions which in the argument seemingly now arise for decision.

I agree with my brother Withers, however, that on the relief asked by the plaint, that question does not arise. The prayer is that the property be declared not liable for seizure and be released from seizure, and I fail to see that plaintiff has made out any right in law to have that prayer granted. Had he prayed an injunction restraining the sale until, say, he could have a hypothecary decree entered in his favour, so as to bring himself within the protection of sec. 352 of the Civil Procedure Code, as interpreted in 9 S. C. C. 203, or had he for such or any other cogent reason at the time of preferring his claim moved the Court, under sec. 246, to make in his favour the order thereby contemplated, it is possible that, under the previous precedents of Clarence, J.'s decisions, he would have succeeded therein, unless it should be held that sec. 232 protected a mortgagee without decree from the rigid rule of sec. 352. His right is to be paid, and paid the first, out of the proceeds sale, and, as expanded in those decisions, in a measure to control the time of sale till this can be done; but it does not destroy the right of the unsecured creditor to be paid out of the surplus proceeds sale and to seize and sequester for that purpose.

Varied.

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Present:—LAWRIE, A. C. J.

(August 17 and 22, 1893.)

M.C., Colombo, No. 5,200. } WEERAPPA v. SPENCER.

Carriage hire—Non-payment of hire—Contract between owner and hirer—Criminal prosecution—Civil action —Ordinance No. 17 of 1873, sec. 16.

Sec. 16 of Ordinance No. 17 of 1873 enacts: "If any person shall refuse or omit to pay to the proprietor..........the sum justly due for the hire of a carriage........it shall be lawful for the police court...... upon complaint of the proprietor, and summary proof of the facts, to award reasonable satisfaction to the party so complaining for his fare or for his damages and costs........and upon the neglect or refusal of such defaulter or offender to pay the same, the same shall be recovered as if it were a fine imposed by such court."

Held, that the provisions of the above section apply only where the fare is to be paid immediately upon the

termination of the journey ; and that, therefore, where a carriage is ordered and used upon an understanding that the hire is to be entered as a debt due by the hirer in an account thereafter to be rendered, the proprietor cannot avail himself of the above provisions, but must resort to a civil court for the recovery of the amount due.

The complainant was a job-master, and hired a carriage to the defendant upon her orders on several occasions between June 10 and July 14, 1893. He kept an account of the number of hours during which the carriage was used on each occasion ; and of the hire due, and sent bills to the defendant for payment several times. The amount not having been paid, he instituted the present proceedings in the Municipal Magistrate's Court, Colombo, under sec. 16 of Ordinance No. 17 of 1873. The magistrate ordered the defendant to pay the amount of hire and an additional sum as damages and costs. The defendant appealed.

Grenier for the appellant.

Cur. adv. vult.

On August 22, 1893, the following judgment was delivered :—

LAWRIE, A. C. J.—Sec. 16 of Ordinance No. 17 of 1873 is not applicable where the understanding or contract between the owner of the carriage and the person hiring it is that the fare shall not be paid to the horsekeeper or owner at the end of the drive, but shall be entered as a debt due by the hirer to the owner in an account to be rendered. Here, Mrs. Spencer is said to have ordered and used a carriage on sixteen different occasions, and when she did not pay the account Rs. 30·50, she was accused of an offence under sec. 16 of the Ordinance. This seems to be a debt to be recoverable in a civil court, and not an offence punishable by a police magistrate.

Reversed.

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Present:—LAWRIE, A. C. J., and WITHERS, J.

(June 9 and 13, 1893.)

D.C., Galle, No. 1,545. } CARPEN CHETTY v. MAMLAN.

Civil procedure—Summary procedure on liquid claims—Leave to appear and defend—Appearance—Objection to procedure—Civil Procedure Code, chap. liii.

Actions under chap. liii. of the Civil Procedure Code the defendant cannot be heard or allowed to take any objection as to the regularity of the procedure without having first obtained the leave of the Court to appear and defend.

In this action the plaintiff sued on a promissory note and adopted the summary procedure in regard to liquid claims under chap. liii. of the Code. The summons was issued calling upon defendant to obtain leave to appear and defend within seven days of the service. The summons having been returned unserved, was on November 14, 1892, reissued for service returnable on December 14, 1892. It was served on December 5 ; and on December 14, after the expiration of seven days from service, the defendant not yet having obtained leave to appear and defend, the plaintiff's proctor, Mr. W. E. de Vos, moved for judgment, when Mr. Proctor W. D. de Vos, appearing on behalf of the defendant, objected to judgment being entered on the ground of certain irregularities in procedure which he pointed out. The learned District Judge held that the defendant should have first obtained leave to appear before he could be heard to object to the procedure ; and as an application had not even been made for such leave, he entered judgment for plaintiff.

The defendant appealed.

Dornhorst for the appellant. It is submitted that it was competent for the proctor to appear conditionally and take objection to the proceeding before asking for leave to defend the action. The learned District Judge was wrong in holding that the defendant came too late. In D. C., Colombo, No. 469 C, 9 S. C. C. 120., judgment had been passed. In that case, before leave to appear and defend was granted, the defendant appeared and took certain objections to the procedure, which were upheld.

Wendt for the plaintiffs: The Code nowhere provides for the conditional appearance of a party. The words of sec. 704 of the Civil Procedure Code are imperative—"the defendant shall not appear or defend the action, unless he obtains leave from the court as hereinafter mentioned so to appear and defend." Here the defendant was clearly out of time ; and the District Judge, it is submitted, was quite right in refusing to hear him. D. C., Colombo, No. 468 C, 9 S. C. C. 120, was in application under the special provisions of sec. 707, and possibly the defendant may still avail himself of those provisions ; but at the present stage he cannot resist judgment being entered.

Dornhorst in reply.

Cur. adv. vult.

On June 13, 1893, the following judgment was delivered :—

LAWRIE, A. C. J.—When a defendant is summoned under chap. liii. an appearance by counsel, who *ore tenus* takes objection to points of procedure, is unvailing. Before the defendant can be

heard he must file an affidavit setting forth the facts on which his defence is founded, and he must pray for and obtain leave to appear and defend.

WITHERS, J.—This action on a promissory note is intended to be one by way of summary procedure in accordance with the provisions of chap. liii. of the Civil Procedure Code. On October 25 last plaintiff's proctor moved to be allowed to issue summons in terms of sec. 703 of the Civil Procedure Code. That motion was allowed. Defendant was accordingly summoned to obtain leave from the Court on certain conditions, within seven days of the service of the summons, to appear and defend the action. On November 14 following, the service of summons not having been effected, summons was re-issued for December 14, on or before which day the Fiscal was required to certify to the Court in what manner he had executed the precept to him to serve the summons so re-issued. On that day plaintiff's proctor moved that judgment be entered for the plaintiff. To that motion, according to the record, cause was shown by Mr. W. D. de Vos for the defendant. How the learned Judge came to recognise the appearance of Mr. W. D. de Vos, or allowed him to show cause against the motion, I do not quite understand. But he did do so; and on December 20, the matter of plaintiff's motion was discussed before him by both Mr. W. E. de Vos and Mr. W. D. de Vos. In the end the learned Judge decided that Mr. W. D. de Vos was not competent to take any objection to the mode of procedure antecedent to the motion for judgment, the defendant not having obtained leave from the Court to appear and defend, and he entered up judgment for the plaintiff.

In my opinion the defendant was not properly before the Court. He was summoned to obtain leave of Court to appear within a given time to defend the action. The appearance by Mr. W. D. de Vos was nugatory. It was not sanctioned by leave of the Court.

Mr. Dornhorst argued that defendant's appearance by his proctor Mr. W. D. de Vos was not an appearance to defend the action, but a conditional appearance for the purpose of objecting to the irregularity of the proceedings antecedent to the motion for judgment. It seems to me enough to say that our Civil Procedure Code nowhere provides for conditional appearances. I think the appeal fails, and the appellant must pay costs.

Appeal dismissed.

Present :—WITHERS, J.

(*August* 24 *and* 28, 1893.)

P. C., Galle, No. 10,491. } ALEXANDER v. ALWIS.

Forest Ordinance—"Forest-produce"—"Timber", removal of—Regulations under sec. 44 *of Ordinance No.* 10 *of* 1885—*Government Gazette, September,* 2, 1887—*Ordinance No.* 1 *of* 1892, *sec* 14.

Sec. 44 of Ordinance No. 10 of 1885 provides for regulations being made (sub-section (b) for prohibiting the removal of "forest produce" without a pass, "forest produce" being defined in the interpretation clause as including timber when found in or brought from a forest.

Sec. 14 of the amending Ordinance No. 1 of 1892 enacts that the terms "forest produce" and "timber" in the above section shall, after the passing of the later Ordinance, include timber cut on any land, whether the property of the Crown or any private individual.

Held, that the amending Ordinance does not affect retrospectively the regulations framed under the principal Ordinance, and that therefore a regulation framed before the passing of the amending Ordinance, prohibiting the removal of forest produce without a pass, is of no force so as to make the removal, after the passing of the amending Ordinance, of "timber" cut on any private land an offence.

The defendants were charged under sec. 45 of the Ordinance No. 10 of 1885 with having on May 12, 1893, removed without a pass certain timber, viz., mango wood planks, in breach of rule 1 of the rules framed under sec. 44 of the Ordinance No. 10 of 1885, and published in the *Government Gazette* of September 2, 1887.

The timber was admittedly timber cut on private land. The rule in question enacted that "no person shall . . . . . . move any timber or forest produce without a pass from the Government Agent," &c. It was contended for the defendants that the rule, so far as it referred to timber, was *ultra vires*; but the Magistrate considered that the effect of sec. 14 of Ordinance No. 1 of 1892 was to render valid that part of the rule. The defendants were convicted, and they appealed.

Seneviratne, for the appellants, cited P. C., Gampola, No. 13,750, 2 C. L. R. 158.

Cur. adv. vult.

On August 28, 1893, the following judgment was delivered :—

WITHERS, J.—It is allowed that the rule which the accused have been convicted of offending could at the date of its passage affect forest produce only

and that "timber" was not a legitimate subject of the rule. The Magistrate, however, holds that the rule has been retrospectively legitimated by sec. 14 of Ordinance No. 1 of 1892, which enacts that the term "forest produce" in sec. 44 of the principal Ordinance shall, unless the context otherwise requires, after the passing of the later Ordinance, include timber cut on private lands. I think he is wrong. The Ordinance of 1892 does not enact that the term "forest produce" whenever it occurs in regulations passed under the principal Ordinance before its passsage shall include timber cut on private lands. A regulation made under the authority of an Ordinance has no doubt the force of law; but it does not become *ipso facto* part and parcel of that Ordinance, unless so expressly provided by the Ordinance itself. The regulation in question depends for its authority on the principal Ordinance, which did not sanction the inclusion of timber as well as forest produce at the date of its passage.

Set aside.

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Present:—WITHERS, J.

(September 14 *and* 15, 1893.*)*

P. C., Colombo, No. 26,082. } FERNANDO v. FERNANDO.

Criminal procedure—Crown costs—Non-summary case—Power of police magistrate—Ordinance No. 22 *of* 1890—*Criminal Procedure Code, sec.* 236.

Under sec. 236 of chap. xix. of the Criminal Procedure Code as amended by Ordinance No. 22 of 1890, a police magistrate can award Crown costs only in cases where he has power to try summarily.

P. C. Negombo, No. 6,777, 8 S. C. C., 196, distinguished.

The complainant charged the defendant with having committed an offence under sec. 208 of the Ceylon Penal Code, being an offence punishable with two years' imprisonment, or fine, or both. The Police Magistrate, after hearing the evidence for the prosecution, discharged the defendant, holding that the charge was frivolous and false, and ordered the complainant to pay by way of Crown costs a sum of Rs. 5.

The complainant appealed.

Pereira, for the appellant. It is submitted that the order as to Crown costs was irregular. By the Ordinance No. 22 of 1890, sec. 236 of the Criminal Procedure Code was amended, and the words "under this chapter" were inserted in the section, and the chapter in which that section appears refers only to cases in which the Police Magistrate has power to try summarily. This case being one beyond the Police Magistrate's summary jurisdiction, it is submitted that the order as to Crown costs cannot stand.

Cur. adv. vult.

On September 15, 1893, the following judgment was delivered :—

WITHERS, J.—The complaint, after enquiring into which the Magistrate discharged the accused, was of an offence not summarily triable by him. It is only as trial magistrate that he can now require a complainant to pay Crown costs. See sec. 236 of Ordinance No. 22 of 1890 substituted for sec. 236 of the Criminal Procedure Code.

The introduction into the substituted section of the words "under this chapter" in the second line thereof shews that the power to order a complainant to pay Crown costs can be exercised by a Police Magistrate only in cases which he is competent to try summarily. The authority of the Supreme Court decision reported in 8 S. C. C. 196 does not apply to this altered state of circumstances.

Set aside.

———:o:———

Present:—WITHERS, J.

(September 14 *and* 19, 1893.*)*

C. R., Colombo, No. 5,060. } MOHIDEEN v. KADER.

Practice—Judgment of consent—Consent irregularly obtained—Power of Court to vacate previous decree—Jurisdiction—Mistake.

A court has an inherent right to vacate an order or decree into which it has been surprised by fraud, collusion, or mistake of fact.

Where, therefore, a decree was entered for plaintiff by consent of defendant's proctor, and the defendant subsequently denied his proctor's authority to give such consent, and applied to set aside the decree,—

Held, that it was competent for the court, if satisfied as to absence of authority in the proctor to consent, to set aside the decree.

On July 21, 1893, judgment was entered for the plaintiff with the consent of the defendant's proctor Mr. Bartholomeusz. The defendant, on July 29, was allowed to withdraw the proxy in his proctor's favour. On the same day, upon plaintiff's motion, writ of execution was also allowed. On August 8 the defendant through another proctor moved to set aside the decree on the ground that the defendant's proctor who consented to judgment had no authority from the defendant to do so, and that therefore the decree had been irregularly entered. This motion was, after argument, disallowed by the

Commissioner on the ground that he had no power to set aside a decree once formally entered.

The defendant appealed.

Dornhorst, for the appellant.

Pereira, for the plaintiff.

Cur. adv. vult.

On September 19, 1893, the following judgment was delivered :—

WITHERS, J.—I think a court has an inherent right to vacate an order into which it has been surprised or entrapped if applied to in time. If this happened (I only say *if*) in the case of the decree of July 21 last, it was competent for the Court in my opinion to vacate that decree and put things *in statu quo*. The best course to adopt will be to set aside the order appealed from and to remit the case to the Court below for enquiry into the matter of the application, refused by the Commissioner by the order now appealed from, of August 8. If, after enquiry, the learned Commissioner is satisfied that the consent to judgment being signed for plaintiff, in terms of the motion addressed to him on July 21, was given mistakenly, collusively, or fraudulently, he will be at liberty to vacate his decree of July 21. By mistakenly I mean a mistake of fact that Mr. Bartholomeusz had authority to consent to the motion of the plaintiff's proctor.

This principle has been recognised in our courts where a judge has been entrapped into a judgment by fraud. See, for instance, 150 *D. C., Kandy*, No. 13,791, October 13, 1881, and *Davenport* v. *Stafford*, 14 L. J. N. S. ch. 414 ; and I do not see why there should not be the same relief where a judge has been surprised into an order by mistake. The order appealed from will be set aside for the purpose indicated. Liberty to apply for costs reserved.

Set aside.

———:o:———

Present:—WITHERS, J.

(September 14 *and* 19, 1893.*)*

C. R., Avisawella, No. 2,577. } ODRIS v. PIRIES.

"I. O. U."—Stamp—Acknowledgment of debt—Ordinance No. 3 *of* 1890, *Schedule B., Part* 1.

Under Ordinance No. 3 of 1890, Schedule B., Part 1, "an acknowledgment of a debt exceeding Rs. 20 in amount or value, written or signed by or on behalf of a debtor, in order to supply evidence of such debt ....on a separate piece of paper when such....paper is left in the creditor's possession", is liable to a duty of 5 cents.

A writing, signed by a debtor and given to the creditor, and unstamped, ran as follows: "I owe you (Rs. 60) sixty only to settle Mr. Mendis' acct. to the end of last August."

Held, that the document did not come within the operation of the above provision, and was therefore not liable to stamp duty, and was admissible as evidence of an account stated.

The plaintiff sued the defendant for the recovery of the sum of Rs. 60, being money due for rice sold and delivered by the plaintiff to defendant and for money due on an account stated "as per i. o. u. annexed to the plaint". The I. O. U. referred to was in the following words: "I owe you (Rs. 60) sixty only to settle Mr. Mendis' acct. to the end of last August. Johannes Piries. 16/11/92."

The answer denied defendant's indebtedness, and also pleaded that the plaintiff could not sue on the writing, as it was not stamped. Judgment was entered for plaintiff for the sum claimed and costs. The defendant appealed.

vanLangenberg, for the appellant.

Dornhorst for the plaintiff.

Cur. adv. vult.

On September 19, 1893, the following judgment was delivered :—

WITHERS, J.—I affirm this judgment with costs. The I. O. U. improperly pleaded as evidence in the plaint was admissible in support of the count on an account stated between the plaintiff and defendant on or about November 16, 1892.

An ordinary I. O. U. like this is not liable to stamp duty. It is not worded so as to come within the definition of an acknowledgment of a debt (see Part 1, Schedule B, in the Stamp Ordinance No. 3 of 1890); nor is there special matter contained in it which renders it liable to stamp duty as an agreement or promissory note.

Affirmed.

———:o:———

Present:—LAWRIE, A. C. J., and WITHERS, J.

(June 27 *and* 30, 1893.*)*

D. C., Negombo, No. 15,735. } SUMANA TERUNANSE v. KANDAPPUHAMY.

Buddhist law—Vihare—Succession—Sisyanu Sisyaparamparawe—Incumbent—Failure of pupils—Right of co-pupils—Plaint—Pleading—Legal objection.

Under the law of pupillary succession to a Buddhist vihare, if the last incumbent leaves no pupil, and has not nominated a successor by deed or will, the incumbency can pass to his co-pupils only if their common tutor was himself in the line of succession from the founder or original grantee of the vihare.

D. C., Colombo, No. 42,709, Ramanathan (1863-68) 280; *D. C., Kandy,* No. 74,378, 2 S. C. C. 27; and *D. C., Matara,* No. 30,710, 5 S. C. C. 8 commented on.

Per WITHERS, J.—An objection to a plaint as disclosing no cause of action may be taken *ore tenus* at any time, subject only to the discretion of Court as to costs.

The facts material to this report appear in the judgments of the Supreme Court.

The plaintiffs appealed from the judgment of the District Court, dismissing their action.

Wendt (*Seneviratne* with him) for the appellants.

Dornhorst for the defendants.

Cur. adv. vult.

On June 30, 1893, the following judgments were delivered:—

LAWRIE, A. C. J.—The parties are agreed that Indejoti Unnanse was the incumbent of Godagomuwa Vihare, that he died in 1885 leaving no pupil, that his tutor had predeceased him, and that he did not execute a deed disposing of the vihare or nominating a successor in the incumbency. The parties are disagreed as to whether Indejoti Unnanse left co-pupils. The three plaintiffs allege that they were his co-pupils, in that they were all pupils of Pannala Terunnanse, though at the same time the plaintiffs admit that Pannala Terunnanse was never the incumbent of this vihare, and that Indejoti got it in some other way than by succession from his and their tutor.

The defendants deny that Indejoti was the pupil of Pannala or that the plaintiffs were his co-pupils.

The plaintiffs do not expressly allege that this vihare is held by any other than the usual *sisyaparamparawe*, from tutor to pupil, though from the allegations, both of the plaintiffs and the defendants, it is clear that both admit that in recent times there have been variations in the descent of this incumbency from the strict rule of pupillary succession. In the absence of averment of another tenure known to the law, we must assume that the successor to Indejoti Unnanse must be looked for in the line of pupillary succession from a former incumbent.

Here it is admitted by both parties that there exists no pupil either of Indejoti or of any incumbent from whom pupillary succession could be derived. The line of pupillary succession has come to an end.

Has the vihare become *sangika*? Or has it devolved on the co-pupils of Indejoti? My opinion is that the law is that it became *sangika*; but there is authority for the other view in a case reported in Ramanathan (1863-68) 280. The counsel for the parties in that case admitted that when a priest died without leaving a pupil of his own the pupils of his deceased tutor would be entitled to succeed to the incumbency. That is a legitimate admission, provided these co-pupils were in the line of the succession—that is, if their tutor was, equally with the tutor of the deceased, descended from the original incumbent. But the report implies that the claimants of the vihare did not belong to the line of pupillary succession to the vihare, for that the deceased incumbent had got the vihare by deed from a stranger. The deceased had been twice ordained. He thus had had two tutors, neither of whom had had any right to the vihare. The plaintiffs were the pupils of the second tutor and the defendants were the pupils of the first tutor. The plaintiffs contended that they were the deceased's only sacerdotal relations recognised by Buddhist law, inasmuch as by throwing off robes the deceased had severed all connection with his first tutor. The District judge (Lawson) sustained the plaintiffs' claim; but the Supreme Court reversed the judgment and non-suited the plaintiffs, holding that the plaintiffs had not proved that the second robing took place before the deceased acquired the deed for the vihare. The question of the right of co-pupils to succeed was not decided; and with every respect to the counsel who made the admission in law, and to the District Judge who decided that case, it is clear to me that they were wrong, and that the succession there depended on the declaration in the deed by which the deceased acquired the vihare, and not on a question of the rights of co-pupils.

I would have said that case was of no authority, were it not that it was quoted by Sir John Phear as an authority for a statement of the law in *D. C., Kandy*, No. 74,378, 2 S. C. C. 29, "that the Supreme Court has recognised that the *sisyaparamparawe* has some elasticity, and is not rigidly restricted to the actual pupils of the deceased incumbent; it may comprehend his fellow pupils or the pupils of an institution with which he stood in intimate relation; and the selected authority in reference to these need not necessarily be the deceased himself, but may be some other sacerdotal person or personage, or college, variously defined". I do not understand the latter part of this sentence, nor have I discovered any authority for it, but for the first part of the sentence Sir John Phear quotes the case I have just referred to in Ramanathan (1863-68) 280. I venture to think that this expression of the law, which in the circumstances was *obiter*, is not correct.

In 5 S. C. C. 8 I find a decision which is very puzzling to me. There Dias and Clarence, JJ., held that, on the death of an incumbent without leaving a pupil, his tutor succeeded to the vihare; but it is not explained by what tenure that vihare was held; surely, not by pupillary succession, for

in that case the tutor would have been the incumbent, and the pupil would have had, during his tutor's life, only the expectancy of succession if he survived. But if it was not held by *sisyaparamparawe*, why was the tutor selected? Dias, J., said: "I always understood the rule to be that after exhausting the descending line you must resort to the ascending line, such as the tutor of the deceased incumbent, and, failing him, his fellow pupils."

I confess I do not understand this. The descending line cannot be exhausted if there be an ancestor or a collateral qualified to take. The descent is from a founder or original grantee, and the line of his succession is not exhausted so long as there are persons alive who descend in the pupillary line from him. But when that line is exhausted, there is no ascending line to which you can resort. Any other line is a line of strangers to whom the incumbency cannot go.

I take the law to be that, on the death of the last of the line descending from tutor to pupil from the original incumbent, the *sisyaparamparawe*, the connected chain, ends. There is no sacerdotal descent left. The vihare becomes *sangika*—common, according to some authorities, to the priests who attended the death-bed of the last incumbent, or, as I think according to better authority, to all ordained priests in common, subject perhaps to the contest and nomination of the Mahanayake of Asgiriya or Malwatte.

Here, in my opinion, the plaintiffs have not averred any right by pupillary succession from an incumbent, and they are not in the line of succession, and have no right. I would dismiss the action with costs.

WITHERS, J.—In this action three Unnanses, Delgalle Sumana, Vitanamulla Dharmapale, and Thammitta Dharmerakita, seek to recover from the defendants Godigamuwa Vihare and land adjacent to it, from which it is alleged that the defendants ousted, in May, 1887, the 3rd plaintiff, who, according to the plaint, had been in possession of the premises since some time in the year 1885 under an appointment "to undertake the occupation and management of the said vihare and lands" by certain co-pupils of one Navane Indejoti Unnanse. The appointing co-pupils are not specified in the 6th paragraph of the plaint, which refers to the 3rd plaintiff as occupier and manager of the vihare and adjoining lands. It can only be inferred from the context that they are survivors of the seven pupils of the late Pannala Dharmepalle Unnanse mentioned in the 1st paragraph of the plaint, including the 1st and 2nd plaintiffs.

In this paragraph it is alleged that one of the seven pupils, viz., Ambenamulle Dhammepalle, was the incumbent and lawful owner, and proprietor of the said Godagamuwa Vihare. There is, however, no pupil of that name. There is a Ammanemulle Dhammarakita and a Vitanemulla Dharmepale. The termination "rakita" in the name of the so-called incumbent of Godagamuwa has been erased and "pale" superscribed. This causes considerable confusion, and makes it almost impossible to guess of whom it is intended to allege that a certain person was once the incumbent and proprietor of Godagamuwa Vihare. Nor is it quite easy to perceive what the pleader meant by alleging that Dharmepale was both lawful owner and incumbent of the vihare.

Of this Dharmepale Unnanse it is alleged that he placed one of his co-pupils under the said tutor Pannala Dharmepale, viz., Ullellepolle Unnanse, "in charge and possession" of the said vihare, and that on the death of the said Ullellepolle he put Essella Medhankara Unnanse "in posssession" thereof in the year 1868, and that having died in the year 1870, without any pupils of his own, he "confirmed his appointment of his said co-pupil Essella Medhankara Unnanse as incumbent of the said vihare". Nothing can be looser than this style of pleading, which uses "charge", "possession", and "incumbency" apparently as synonymous terms. Then, the pleader goes on to say that this so-called incumbent Essella Medhankara Unnanse purchased from the Crown (when, it is not said) lands adjoining the vihare—some 11 acres, 3 roods in extent—and that he "annexed" them to the said vihare. What the process of "annexing" a land to a vihare is, and what the legal result of such a process may be, I have no idea or shadow of an idea. A sequence or consequence in this case seems to be that the land so purchased and annexed by Esselle Nedhankara became known thenceforth as Godagamuwa Vihare.

Essella Unnanse, it is said, possessed the vihare and the lands annexed to it until his death in 1873. Thereafter, it is alleged that, he having had no pupils of his own, Essella's surviving fellow pupils appointed one of themselves, viz., Navane Indejoti Unnanse, to be his (Essella's) successor, and put and placed him in the possession of the vihare and the lands annexed to it. This Navane Indejoti is said to have had undisturbed possession of the vihare and lands till his death in 1885, when it is alleged that his co-pupils—he having had none of

his own—appointed one of themselves, to wit the abovenamed 3rd plaintiff, to undertake the occupation and management of the said vihare and lands. Of themselves the plaintiffs say that they, as the sole survivors of the co-pupils of the successive occupants of this vihare and of the lands annexed to it, are entitled to the said vihare and lands, and they claim to have the defendants ejected therefrom and the plaintiffs placed in possession thereof. They further pray for damages consequent on the alleged unlawful dispossession by the defendants.

Before us, and in the Court below, Mr. Dornhorst argued that the plaint disclosed no cause of action either for a declaration of title in the plaintiffs as joint owners, and incumbents of the said vihare and lands thereto "annexed", or for a decree of possession.

Mr. Wendt, for the appellants, argued that there was a sufficient title disclosed in plaintiffs in the premises, and that in any event there was disclosed a *prima facie* title by possession to the premises, which, if the ouster was proved, and the defendants failed to prove a better title in themselves, would well support a decree for possession as prayed for by his clients, and he relied on the judgments of Chief Justice Burnside in D. C., Matara, No. 35,494, 9 S. C. C. 7, and C. R., Haldummulla, No. 17, 1 C. L. R. 67.

As to the right in the plaintiffs to be declared joint incumbents and owners of the vihare and adjacent lands purchased from the Crown by Essella Medhankare Unnause, I quite fail to discover upon what it is based. It is not, to my mind, well alleged as a matter of fact that the 3rd plaintiff was duly appointed incumbent of the vihare and the adjoining lands; but what right his co-pupils, under the late tutor Pannella Dhammapale, had to appoint him managing incumbent, or he to accept it and arrogate to himself that office, I cannot comprehend. Take the lands purchased by Essella Unnanse, and said to have been "annexed" by him to the Vihare. What interest had his co-pupils, or could they have, in lands granted to him "his heirs and assigns" (so runs the grant of which a copy is produced with the plaint)? None; absolutely none. Again, what interest had his co-pupils in the Vihare which Ambenamulle Dhammapale or Dhammerakita is said to have enjoyed as incumbent and proprietor? Failing a due appointment by deed or last will of his, how could the right to hold the incumbency of that Vihare devolve on his co-pupils under the late Pannella Dhammapale, or the right to dispose of that incumbency? By what law or custom? It seems to me clear and beyond all doubt that there is no foundation for the prayer that these plaintiffs be declared the joint incumbents and owners of this Vihare and certain lands adjoining it.

Now, as to the alleged fact of possession of premises by the 3rd plaintiff, and the prayer of all the plaintiffs to have the premises given up to them. This is not the case of a co-shareholder coming into Court by himself and claiming to be restored to the possession of lands of which he has been deprived by others than his tenents in common. It is a claim to joint possession by joint owners so styled. They do not ask that the premises be given up to the one of them said to be wrongfully dispossessed, but that they be given up to them all as entitled to the joint possession. This case is, on the face of it, differentiated from those cited by Mr. Wendt. The first two plaintiffs are not seeking to be restored to the possession acquired, and held by them through their agent the 3rd plaintiff. All ask to be restored to a possession which is not predicated of all, and what is predicated of one of the three is occupation, and management entrusted to that one by the other two.

There cannot be said to be a misjoinder, for they claim a joint title and a joint possession; and to leave out one or two of the claimants would invalidate the claim. It appears to me that title other than possession is alone set up; and as title is not disclosed, the action fails, and was, I think, properly dismissed, and I would affirm the judgment with costs.

The answer hardly meets the entire action of the three plaintiffs, and the action failed by reason of the arguments taken *ore tenus* by defendants, counsel in the Court below, and repeated before us. The defect of a plaint as disclosing no cause of action may be taken at any time by way of objection; but what costs success will carry with it, is another question. I do not think the defendants are entitled to the costs of their answer, but I think they are entitled to all other costs in the cause in the Court below and in appeal.

Affirmed.

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Present:—LAWRIE, A. C. J., and WITHERS and BROWNE, JJ.

(August 11 & 15, *September* 15 & 22, 1893.*)*

D. C., Kegalle, No. 224. } SIATU v. KIRY SADUWA.

Appeal—Judgment—Appealable order—Courts Ordinance, sec. 39—Civil Procedure Code, sec. 754—Nindagama—Proprietor—Services—Lease—Right of lessee—Agricultural and personal services—Rajakaria—Authority to recover money in lieu of Rajakaria—Pleading—Construction.

The plaintiff sued the defendants as tenants of a panguwa in a certain Nindagama for a sum of Rs. 121·25 as value of the services due by them, alleging that "by a deed of lease" granted by the proprietor of the Nindagama the plaintiff "was empowered and authorised to recover the rents and produce of the said Nindagama, and the rajakaria services from the tenants, or the commuted value thereof for 1891-1892". The deed referred to bore that the plaintiff was "ordained to take produce, and recover money from the tenants in lieu of rajakaria". The Court decreed that "the defendants do each severally pay to plaintiff such portion of the sum of Rs. 121·25 and of costs of case as will bear the same ratio to that sum as his individual interest in the panguwa may bear to the whole value of the panguwa, the amount of such portion to be the subject of future adjudication before execution shall issue".

Held (WITHERS, J., dissenting) that an appeal lay from the above judgment.

Held, that the plaintiff's action cannot be sustained—

By LAWRIE, A. C. J., on the ground that when the services due by the tenants of a Nindagama are agricultural, that is, work to be done on lands in the possession of the proprietor, the right to demand the services cannot be transferred by way of lease to another unless at the same time the lands on which the services are to be performed are likewise leased, and that when the services are personal the proprietor cannot under any circumstances lease the right to demand such services.

By WITHERS, J., on the ground that upon a true construction of the deed, under which the plaintiff claims, the authority therein contained is limited to the taking of money if tendered in lieu of services and does not empower the plaintiff to sue for and recover the commuted value of the services, if not duly rendered.

Held, further (by LAWRIE, A.C.J. & WITHERS, J.) that an action for damages for non-performance of services by tenants cannot be sustained in the absence of allegation, and proof that the tenants were duly required to perform the services, and failed therein.

The plaint alleged that the late C. H. de Soysa was proprietor of the Dunagama Nindagama, that the defendants (thirteen in number) were the paraveni tenants of the Mahadura panguwa of the said Nindagama, comprising some fourteen fields, and that the defendants were liable as such tenants to perform the following services: to cultivate the muttetuwa, to put up the dams and ridges, to reap and remove the paddy to the granary, to cover the granary with straw, to carry burdens and palanquins, and to make a present of a pingo load of fruits to the Walawwa on the day of the Sinhalese New Year. The plaint then in its fourth para. alleged that "on the 11th July, 1891, by deed of lease No. 13,097, executed by the executor of the late C. H. de Soysa, the plaintiff was empowered and authorized to recover the rents and produce of the said Nindagama, and the rajakaria services from the tenants or the commuted value thereof for 1891-92, due notice of which lease was given to the defendants". The plaint proceeded to state that "the defendants have failed and neglected during the year 1891 to render to the plaintiff the said services or to pay" their commuted value Rs. 121·25, which the plaintiff accordingly claimed from the defendants.

The defendants without answering on the merits took exception to the sufficiency of the plaint on various grounds, and to the right of the plaintiff to sue.

The deed in question witnessed that Siatu (plaintiff) "has taken on lease the lands (enumerated), and the produce as well as all the income from the nilakarayas for two years, viz., for 1891 and 1892", and "that the said Siatu is ordained to cultivate the fields during 1891 and 1892, and take produce and recover money from tenants in lieu of rajakaria".

The District Judge overruled the objections, and held the plaintiff entitled to recover the amount claimed. The judgment concluded as follows:—"I will decree that the defendants as paraveni tenants of the Mahadura panguwa of the Dunagama Nindegama do each severally pay to plaintiff such portion of the sum of Rs. 121·25 and of costs of case as will bear the same ratio to that sum as his individual interest in the panguwa may bear to the whole value of the panguwa. The amount of such portion to be the subject of future ajudication before execution shall issue, and to be recovered in the first instance from the produce of the panguwa belonging to the nilakarayas, and, failing such recovery, by sale of defendants' interest in the panguwa."

The defendants appealed.

Sampayo, for the plaintiff, took the preliminary objection that no appeal lay.

Bawa, for the appellants *contra*.

Cur. adv. vult.

On August 15, 1893, the following judgments were delivered:—

BROWNE, J.—Plaintiff claiming to be lessee from the executrix of the late Henry de Soysa, owner and proprietor of a certain nindegama, and to be (in the words of his lease) "ordained to recover money from the tenants in lieu of rajakaria", sued in this action thirteen defendants as the *paraveni* nilakarayas for Rs. 121·25 alleged to be the commuted value of the rajakaria services due by them. Ten of the thirteen defendants filed answer, wherein they raised only for defence, as matter of law, the question whether the plaint did or did not disclose a right in the plaintiff to bring and maintain this action, and gave nine grounds upon which they submitted their defence should be sustained. The learned District

Judge upheld "the claim of the plaintiff", *i. e.*, I presume that the plaint did disclose the right of the plaintiff to bring this action, and entered a "decree" that the thirteen defendants as *paraveni* tenants of the panguwa in question do each severally pay to the plaintiff such portion of the sum of Rs. 121·25, and the taxed costs of the action as would bear the same ratio to that sum as his individual interest in the panguwa might bear to the whole value of the panguwa; and, further, that the amount of such portion be subject of further adjudication before execution should issue, and be recovered in the first instance from the produce of the panguwa belonging to the nilakarayas, and failing such recovery, by sale of the defendants' interest therein.

The defendants at once appealed from this judgment and decree, and objection has been taken preliminary to the argument thereof that no appeal lay from this decree. I consider the objection should not be sustained, but that the appeal should be heard. No doubt a mere expression of opinion on the part of a judge would not be a decree or sentence (D. C., Mannar, No. 5,326, 2 Lor. 9; D. C., Kandy, No. 82,841, 4 S. C. C. 124); but here there has been a judgment that the plaintiff has in his plaint disclosed a sufficient cause of action, and (since there was no further defence) a decree that each defendant do severally pay his proportionate share of the amount in claim and costs, and a further decree for the ascertainment of each such proportion, and the mode of its recovery. The one question, which the pleadings made at issue between the parties, was thus decided—that a sufficient right or cause of action was preferred for adjudication—and from this decision an appeal lies.

I regard the decree made by the learned District Judge as one of those contemplated by sec. 508 of the Civil Procedure Code, and I apprehend that every successive decree or order in any such piecemeal adjudication would be as open to appeal as was each successive order in *Corbet* v. *The Ceylon Company*,* that determined a principle upon which ulterior proceedings would be taken. If it be so, the right to appeal could more strongly be claimed here, in that, if the defence were upheld and the decision reversed, the Court would be saved the time and trouble and the parties the cost of the proposed further enquiry and adjudication thereon. In my view, the wording of sec. 39 of the Courts Ordinance, and sec. 754 of the Civil Procedure Code, is large enough to include any such decree or other made by a District Court, as the present, among the class of what is rightly appealable.

* D. C., Colombo, No. 72,905.

WITHERS, J.—In my opinion, the appeal is premature, and must be rejected. True, there is a judgment and a decree; but the judgment does not decide the questions at issue, and the decree cannot, as it stands, be executed. The action is instituted by a so-called Nindegama proprietor for the time being to recover compensation from his tenants for failure of services during the plaintiff's alleged proprietorship, under which the defendants hold the lands forming a panguwa of the Nindegama, plaintiff claims that the defendants be condemned to pay him Rs. 121·25 by way of compensation. The learned Judge has found that the compensation asked for breach of services ought to be paid by the defendants not as joint and several debtors, but as debtors *pro parte virili*. It remains to be ascertained and adjudicated what each defendant ought to be decreed to pay the plaintiff.

The judgment and decree are, therefore, inconclusive, and the action has not yet been finally decided. I cannot see how an appeal can be taken from a judgment or so-called decree in this incomplete state, and I think respondent's preliminary objection must succeed, and I would reject the appeal with costs.

If I am not mistaken, the principle of my proposed decision has been constantly recognised by this Court.

LAWRIE, A. C. J.—I am unable to agree to reject this appeal. The defendants plead as a matter of law that the plaint does not disclose a right of action in the plaintiff. They pray that the action be dismissed with costs. The District Judge repelled that plea in law, and found the defendants liable according to the proportion which the land held by them bore to the sum claimed. In my opinion, this is a judgment against which an appeal may be taken. It is not a mere incidental order: it goes to the root of the action.

The case then came on for argument before Lawrie, A. C. J., and Withers, J., on September 15, 1893.

Bawa for the appellants.

Sampayo for the plaintiff.

Cur. adv. vult.

On September 22, 1893, the following judgments were delivered:—

LAWRIE, A. C. J.—In dealing with the issues of law, I take it to be admitted that the defendants hold the Mahadura panguwa in Dunagama for services due to the owner of the Dunagama Nindegama, and that those services are (1) to cultivate the mutettuwa, which includes the putting up of dams and ridges, the reaping and removal of the paddy, (2) to cover the granary with straw, (3) to carry burdens and pal-

anquins, and (4) to make presents of two pingo-loads of fruits worth three shillings at the Sinhalese New Year at the Walawwe, and that the yearly value of these services was fixed by the Service Tenure Commission at Rs. 121·25. It is not alleged by the plaintiff that the services have been commuted. I take it that there has been no commutation ; and if there has been none, then neither the owner of the Nindegama, nor any one claiming right from her has right to a decree for Rs. 125·25 as for a liquidated debt. Neither can the owner or any one from her get a decree for specific performance of the service. All that the owner or anyone deriving title from her can recover is, damages for the loss actually sustained in consequence of the tenants' breach of contract, treating (as I think the law does treat) the tenants as by contract bound to perform the labour and to do the work and services enumerated in the Service Tenure Commission register.

In my opinion, when these services are agricultural —work to be done on lands in the possession of the owner of the Nindegama when the owner leases such land—with it there passes to the lessee the right to require the tenants to perform these agricultural operations, and to recover damages if the tenants refuse to do so. But, on the other hand, I am of opinion that the ninda owner cannot lease the right to demand personal services. If the Nindegama be sold, the new proprietor steps into the place of his vendor, and he can demand the personal services due to the owner; but the services are due to the owner only, and the owner cannot assign or lease to anyone else. It would be contrary to what I conceive is Kandyan custom were a ninda owner to subject his tenants to what they probably would consider the indignity of performing for a substitute services due only to the overlord himself—they may be willing to carry the palanquin, to wash the clothes, to give honorific presents, and to guard the person of the real ninda owner ; butt hey may resent being required to render their services to one who, however respectable, is not the lord.

Now, has the plaintiff here averred facts which give him right to demand the agricultural service of the tenants ? I am of opinion he has not, because he has not alleged that he has a lease of or that he was in occupation of the muttetuwa which the defendants were bound to cultivate. He has not averred when it was that he proposed to prepare the field for cultivation, and when the field was ready for sowing and reaping ; nor has he averred that he or the vidane of the Nindegama called on these defendants to do the work, and that they refused in breach of the contract, and to the loss of the plaintiff of so much money. It is true that the defendants admit that they did not perform they agricultural labour during the months from July, 1891, to April, 1892 ; but I do not read the pleadings as admitting that they were guilty of an illegal omission or failure.

With regard to the other services—to carry burdens and palanquins, and to make presents—these are personal ; and, as I have said, I am of opinion that these cannot be leased or assigned.

With regard to the service to present pingoes of fruits at the Walawwe at the Sinhalese New Year, the dates given by the plaintiff shew that there could not have been a failure to do this, because the plaintiff got his lease in July, and he brought the action on April 8, and between these dates there was no Sinhalese year, which, as we all know, falls on April 11 or 12 of each year.

I would dismiss the action with costs.

WITHERS, J.—The plaintiff sues thirteen defendants, alleging that they for the year 1891 were the *paraveni* nilakarayas of the Mahadura pangua, comprising fourteen specified lands, and said to belong to the Dunagama Nindegama, that as such *paraveni* nilakarayas they were bound to perform during that year certain specified services, that they failed to perform these services, that in an indenture of lease between the plaintiff, and the executor of the late lord of the said Nindegama, he, the plaintiff, was "empowered and authorised to recover the rents and produce of the said Nindegama, and the rajakaria services from the tenants or the commuted value thereof for the years 1891 and 1892", and that the commuted value of those services is Rs. 121·25, and thereupon prays for judgment against the defendants for that amount. None of the allegations were traversed by the defendant ; but on various exceptions it was urged as matter of law in the answer that the plaint disclosed no cause of action against the defendants. No objection was taken to joining all the thirteen defendants in one action ; so that that matter does not come to be considered.

The question, therefore, which we have to determine is, does the plaint support the claim preferred ? We invited respondent's counsel to inform us in what capacity the plaintiff put forward his claim, and he told us it was as assignee of the owner for the time being of the Nindegama pangua, and not as lessee, and his contention appears to be supported by the averments of para. 4 of the plaint.

As lessee, the plaintiff's title to recover any incident attached to the land could only com-

mence on July 11, 1891, the date of the indenture of demise, but the claim is not preferred by the plaintiff as lessee, but under an authority created by the indenture, and the only relevant part of the authority is that which relates to the "rajakaria services" or the "commuted value" of those services. What does that authority mean? I take it to demand and avail of the services incident to the tenure of the Nindegama pangua, and to ask for, receive, and keep the commuted value of those services if tendered in lieu thereof. I cannot construe it to mean the right to sue for and recover the commuted value of those services if not duly rendered when required; and here I must stop to observe that there is no allegation in the plaint that any particular service liable to be performed as incident to the tenure of the pangua by the defendants was at any time required of them or any of them—a fatal omission, as it seems to me, in a claim of this kind. But the expression in para. 4 referred to, of recovering the rajakaria services, or the commuted value thereof, is in itself so obscure that one is obliged to refer to the instrument of authority, produced with the plaint, and mentioned therein to fully understand its meaning. According to the translation of the document, the plaintiff as one of the parties to the instrument is "ordained" to "take the produce and to recover money from the tenants in lieu of rajakaria". So we see, in the first place, that the effect of the instrument is not correctly stated in the plaint, and that the authority is limited to recover money in lieu of rajakaria, whatever this again may mean. As the interpreter of the phrase taken from the instrument, the only legal construction I am prepared to put upon it is that the plaintiff is authorised to take money if tendered by a tenant instead of service.

In my opinion this action is brought to recover damages for failure to perform certain incidental services on the part of the tenants of a Nindegama pangua, and I fail to perceive in the plaint two vital elements of such a claim, viz., the right to require and exact the services specified, and the failure to perform those services after being required so to do. The conclusion I come to is, that the judgment should be set aside and the plaintiff's claim dismissed with costs.

Set aside.

——:o:——

Present:—LAWRIE, A. C. J., & WITHERS & BROWNE, JJ.

(July 20, *August* 18 *and* 29, *& September* 1, 1893.*)*

D.C., Colombo, No. 2,402 C. } PIERIS v. SILVA.

Practice—Appeal notwithstanding lapse of time—Appeal originally fil d in time, rejected at hearing—Civil Procedure Code, secs. 756, 765, 766 *&* 767.

Sec. 765 of the Civil Procedure Code empowers the Supreme Court to admit and entertain a petition of appeal from a decree of any original Court, "although the provisions of secs. 754 and 756 have not been observed".

Held, that the power of the Court extended to all cases in which a regular appeal had not reached the Court under the provisions of secs. 754 and 756, including cases in which (a petition of appeal having been filed in time) the appeal had abated owing to default in the subsequent steps.

This was an application under sec. 765 of the Civil Procedure Code for leave to appeal notwithstanding lapse of time. The plaintiff had originally filed a petition of appeal, and given security for the respondent's costs, in time. But upon the appeal coming on for argument, the petition was rejected on July 7, 1893, an the ground that the appeal had abated by reason that the appellant had failed to deposit in time in the District Court the cost of serving notice of appeal upon the respondent, as required by sec. 756 of the Code. On July 20 the present petition was presented by plaintiff to the Supreme Court, being in form a petition of appeal against the District Court decree, and containing matter excusing the plaintiff's default, together with a prayer that the appeal be admitted notwithstanding the lapse of time. The petition was supported by affidavits.

Before BROWNE, J., on July 20, *Wendt*, for the petitioner, moved for an interlocutory order in terms of sec. 377 (*b*). He submitted, the Court would review its ruling in D. C., Kandy, No. 5,756.* Upon

* *Present:*—BURNSIDE, C. J., & WITHERS, J.

(January 24 *& March* 16, 1893.*)*

D. C., Kandy, Nos. 3,766, 5,014, 5,544, 5,756, 5,800, 5,973.

These were applications by parties, against whom judgments had been pronounced by the District Court of Kandy, that their petitions of appeal against such judgments might be admitted by the Supreme Court notwithstanding the lapse of time. The applicants had filed petitions of appeal, and given security for costs in time, but had not made the deposit for cost of serving notice of the appeals on the respective respondents. The applicants now filed in the Supreme Court their petitions of appeal, which also contained the prayer that they be admitted notwithstanding lapse of time. The affidavits tendered showed that by a practice obtaining in the District Court of Kandy, appellants did not deposit the money to cover cost of serving notice within the time

failure to comply with the requirement as to costs of serving notice of appeal, the appeal abated,)see sec. 756 *ad fin.*) and there was no longer any appeal. The affidavits showed that the default was due to causes beyond the petitioner's control, and established the conditions precedent required by sec. 765.

On August 18 the following order was made:—
BROWNE, J.—As suggested by Mr. Wendt when preferring the present petition under sec. 765 of the Civil Procedure Code I have conferred with my lord the Acting Chief Justice and my brother Withers ere granting or refusing the order *nisi*, which under the provisions of secs. 377 (b) and 767 would follow thereon, were it to be allowed.

The argument on this petition would raise anew for decision the question which in regard to several like petitions in No. 5,756 and other cases from the District Court of Kandy was decided by Burnside, C. J., and Withers, J., on March 16 last. It was then held by this Court that when one petition of appeal had been presented to the Court of first instance, and for default of giving security, or making deposit, had been held to have been abated, it was not competent for this Court to entertain a petition of appeal presented to it under the provisions of sec. 765.

No doubt it is highly inexpedient at any time that any question once ruled upon should be raised again in argument, unless it should happen that in the unanimous judgment of a Collective Court the former, decision was erroneous for conflicting decisions lead to uncertainity in the practice of the Court and the possible detriment or inconvenience of suitors. But I feel myself bound to say, with all deference to the previous decision already mentioned, that I cannot construe sec. 765 of the Civil Procedure Code, and the power therein given to the Court, as at all limited by any words therein or by the fact that there is existent an abated petition of appeal lying in the pages of the record in the District Court office, and by the provisions of sec. 756 relating thereto. The power to this Court is not given only whenever "the provisions of sec. 754 have not been observed", and no petition shall have been filed in ordinary course, but is given absolutely to this Court to exercise its power of grace direct without the mediation of prior proceedings in the the District Court, should it find the applicant deserving of such grace. There is no limitation to this power. On the contrary, it is enacted that this Court may do so "although", *i. e.* even though, the provisions of secs. 754 and 756 have not been observed—in other words, even in cases where the ordinary procedure, whose initial and concluding stages are detailed in these two sections, has not been carried out in its entirety.

This construction gives this Court the power and the suitor the relief which the former decision, for

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limited by sec. 756 of the Code, but only when it was asked for by the Secretary of the Court, which was usually when the records had been made up and were ready for forwarding to the Appellate Court. In the present case, the District Judge, having discovered that the deposits had not been made in time, made order that the appeals had abated, and hence the present applications.

The Supreme Court made interlocutory orders in favour of the applicants, and the cases now came up together.

Grenier, Dornhorst, Seneviratne, and *Wendt* for the parties.

On March 16, 1893, the following judgments were delivered:—

BURNSIDE, C. J.—Personally I should be glad to allow these applications if I thought we had the power to do so; but I am sure we have no such power. In fact the application is virtually one to allow a second petition of appeal, the first having been defeated by operation of law. The first appeal abated: I can find nothing in the Code by which it may be revived. There has therefore been one appeal already, and we are now asked to allow another to be filed out of time. It cannot be contended that the appeal having abated may be revived; and if it could, it could not be treated as an appeal filed out of time, because it has been already filed in time.

It is a matter to me of sincere regret to find that in many of these cases the proctors, whose clients had secured a judgment, consented that the other side should have leave to appeal without even consulting their clients. I cannot too severely condemn such proceedings. What would be thought of a rider who had ridden a winning race who at once consented to run it over again without consulting the owner, because the other rider had ridden badly? This is precisely what these gentlemen have done, and seemingly considered it right to do. They had won the actions for their clients and obtained judgments. They then consent that the losing side should have leave to appeal out of time, and so forego the advantage which their clients have obtained, without any possible benefit, and with the possibility of loss to their clients, but in any case with advantage to themselves in the shape of costs. I should have been better satisfied had those proctors who consulted their clients before they consented shewn that the clients fully understood the disadvantage to which the consent exposed them. It is not pleasant to feel it a duty to say that proctors' duty is above all to guard their clients' interest, and not sacrifice it even to exigencies between themselves.

WITHERS, J.—I share with the Chief Justice the regret that he has expressed at being unable to allow these applications; but I do not see how we can allow these according to law. In not pressing legal advantages given to them by their adversaries' mistakes the proctors in some of these cases have manifestly neglected the duties they owe to their clients as guardians of their interests. In the cases in which the proctors secured the consent of their clients to forego an advantage it was incumbent on them clearly to point out to their clients the consequences that would be likely to ensue. I daresay they did so, but the law has saved these clients from their friends.

In this connection it is as well to invite attention to the decision of this Court reported in 2 *C. L. R.*, 123. *Henderson* v. *Daniel.*

Applications refused.

the reasons then given, held they respectively were not, in cases like the present, entitled to exercise and enjoy; and as my lord the Acting Chief Justice concurs in my view, it appears to me that, even though my brother Withers dissents* therefrom, and there does arise this conflict of opinion and decisions, I should rule in favour of that view which construes larger power and greater relief, and allow a rule *nisi* to issue under the provisions of sec. 377 (*b*), being satisfied on the affidavits filed that the applicant is otherwise entitled thereto.

On August 29, before the Full Court, *Seneviratne* (*Senathiraja* with him), for the respondents, showed cause. He contended that the decision in D. C., Kandy, No. 5,756, had never been overruled, and under it the plaintiff could not take advantage of sec. 765. The terms of that section were against plaintiff, "although the provisions of secs. 754 and 756 have not been observed". Those words summed up all that an appellant had to do in appealing in the regular course, and amounted to saying "although the appellant has not appealed in the regular course". Here plaintiff did appeal, but subsequently made default. For such default the Code provides no remedy.

Wendt (*Dornhorst* with him), for the petitioner, argued that D.C., Kandy, No. 5,756, had been overruled by the order of August 18 in this very matter. The argument for the respondents practically amounted to this, that a total failure to take any steps at all towards appealing would entitle a party to apply under sec. 765, while a partial failure in certain steps only would not. The intention of sec. 765 was broadly to empower this Court to extend the time for perfecting an appeal—the filing of the petition, giving of security, &c., being done in the Supreme Court for convenience, as that Court has to decide the preliminary question (sec. 767) whether the petition ought to be admitted.

Seneviratne in reply.

[The merits of plaintiff's application were also argued, as to which the case is not reported.]

Cur. adv. vult.

On September 1, 1893, the following judgments were delivered :—

*Withers, J., had in a memorandum suggested the difficulty that sec. 765 contemplated only a case in which the petition preferred to the Supreme Court had not been lodged in the lower Court within the prescribed time so that it was not in the power of the original Court to receive it; but his lordship expressed his willingness to yield his own opinion if the rest of the Court did not feel this difficulty.

LAWRIE, A.C.J.—I am of opinion that the 765th and subsequent sections of the Civil Procedure Code confer on this Court jurisdiction to admit and entertain petitions of appeal presented immediately to it in cases in which an appeal is either not permissible or has already been rejected in consequence of the provisions of secs. 754 and 756 not having been observed.

We have been referred to unreported decisions of this Court in some cases from the Kandy District Court in which the appeal had abated and in which relief under chap. lx. was refused. There seems to be this distinction between those cases and the present, that in those the appellants did not present to this Court a new petition of appeal as is required by sec. 766; but whether there be or be not a distinction between the Kandy cases and the present, when this point comes before me, as it does now, for the first time, I am bound to give to chap. lx. of the Code what in my humble but decided opinion is its plain meaning. I desire to conserve, and not to abridge, the jurisdiction of this Court, and I hold that we have a right to admit and entertain petitions of appeal against any judgment of any original Court pronounced in any civil action, notwithstanding that the appeal petition does not reach us through the original Court with all the troublesome formalities required by chap. viii.

Petitioners must, however, satisfy us (1) that they were prevented by causes not within their control from complying with the provisions of secs. 754 and 756. I assume that in this case the appellant did not comply with the provision which obliged him to deposit a sufficient sum of money to cover the costs of serving the notice of appeal on the respondents. It is impossible to hold that he was prevented from doing this by causes not within his control. He could have done this if he had taken ordinary care. He has suggested no cause of prevention : he says only that having put off till the last half hour he could not then buy stamps. Failing stamps, he ought to have hurried back to the Court, and have tendered the requisite rupees and cents. If he had tendered coin, and if that had been refused, he would not have been in default, and he would have complied with the words of the Ordinance. Then (2) the petitioner in this case had to satisfy the Court that he has a good ground of appeal. On that point I am by no means satisfied. (3) He had to shew that nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable for the judgment creditor that the decree should be disturbed. On that point I am satisfied with the affidavit of the proctor uncontradicted by the respondents. I would

sustain the competency of the proceeding, and I would refuse the prayer of the petitioner on its merits, viz., because the petitioner has not shown that he was prevented from complying with the provisions of secs. 754 and 756 by causes beyond his control, and because it does not appear to me that he has a good ground of appeal.

WITHERS, J.—I think the order *nisi* should be discharged for the reasons given by the Chief ustice.

BROWNE, J.—In allowing the rule *nisi* to issue on this application I have already expressed my opinion as to the right of this Court to allow appeals, to the same effect as now ruled by my lord the Chief Justice, and on reconsideration of the other requirements for obtaining leave I concur in the order now made.

Order discharged.

———:o:———

Present:—WITHERS & BROWNE, JJ.

(August 8 & 11, 1893.*)*

D. C., Kalutara, No. 640. } PERERA v. ABERAN APPU.

Pleading—Claim in execution—Execution-creditor—Plaint—Averments—Subsisting debt—Damages—Civil Procedure Code, sec. 247

In an action under sec. 247 of the Civil Procedure Code by an execution-creditor against a successful claimant, it is incumbent on the plaintiff to aver and prove that at the date of action he holds an unsatisfied money decree, as well as that the property he seeks to attach is assets of his debtor liable to be levied thereunder.

The plaintiff, as execution creditor in a previous action against the 8th, 9th, 10th, and 11th defendants in this action, brought this action under sec. 247 of the Civil Procedure Code to have it declared that certain property seized under his decree belonged to his execution debtors, and was leviable under his judgment, and to recover damages for a wrongful claim by the first seven defendants, averring against them that they had unlawfully claimed the said property when seized, and had their claim allowed. But there was no allegation in the plaint that at the date of the present action anything was due under the judgment in the previous case.

The first seven defendants in their answer pleaded, among other things, that "the allegations in the plaint do not entitle the plaintiff to the relief prayed for". At the trial they contended, in support of this plea, that the plaint should have shown that at the date of this action some amount was due under the previous decree. The District Judge upheld the objection, and dismissed the plaintiff's action.

The plaintiff appealed.

Sampayo for the appellant. The plaint is not bad on the ground alleged. The wrongful claim is the gist of the action (D. C., Kalutara, No. 626, 2 *C. L. R.* 191) and it is enough if at the time of seizure the plaintiff had a decree which he was entitled to enforce. Even if the judgment is subsequently satisfied, the original claim is none the less wrongful, and in respect of it an action is still available to plaintiff. The Code provides for recovery of damages (sec. 248), and for this purpose at all events an action is maintainable. Further, the objection, which was not properly taken in the answer, would not now be upheld so as to result in a dismissal of the action, as, if it had been taken, the plaintiff might have amended the plaint.

Morgan for the defendants. The object of the action, under sec. 247 of the Code, is to have it declared that the property is liable to be seized. Such a declaration cannot be made unless there is an unsatisfied judgment in respeet of which seizure and sale are necessary. The plaint therefore was clearly defective. The claim for damages is a mere subsidiary matter, and no such claim can be made unless the action is otherwise well founded upon a judgment still capable of being enforced. As to amendment of the plaint, no application for the purpose was made even at the argument in the Court below, and it is submitted that the action was rightly dismissed.

Sampayo in reply.

Cur. adv. vult.

On August 11, 1893, the following judgments were delivered:—

WITHERS, J.—I think the learned Judge was right in pronouncing the plaint defective, but I think he went too far in dismissing the claim altogether in consequence.

The point of law was not very fairly taken in the answer—in the sense, I mean, of not being as explicit as it should have been. Had the ground been specified in the answer, plaintiff, if so advised, might have applied for leave to amend his plaint by stating, if true, that he had recovered a money decree against the 8th and after defendants for so much with costs, and that the amount so recovered was at the date of the order complained of and at the date of

institution of this action unsatisfied wholly or partially, as the case may be, and he would have been or should have been allowed to make the necessary amendment.

I should have thought that the fact of a subsisting money decree was as essential an element in a plaint by a judgment-creditor under sec. 247 of the Civil Procedure Code as a statement of the order releasing the seizure and the date of that order. That order is conclusive, unless within fourteen days an action is instituted to have it declared that, the order notwithstanding, the property seized and released is liable to be sold in satisfaction of the execution-creditor's judgment, and unless that declaration is adjudged.

Mr. Sampayo, however, argued that it was at least not necessary to allege the subsistence of the judgment-debt at the date of action, because a judgment-creditor, even if paid after release of seizure occasioned by an improper objection or claim, would be entitled to recover damages consequent thereon in an action instituted for the purpose of having it declared that at the *date of the order* of release the property as his debtor's assets *was* liable to be sold in execution of the decree in his favour. That is a very plausible contention ; but looking at the effect of the order which, subject to the result of the action, shall be conclusive, and to the object of the action permitted to the judgment-creditor by sec. 247, viz., "to have the said property declared liable" (*i.e.*, I take it, presently liable) to be sold in execution of his decree, the plaintiff in his action must in my opinion declare on a subsisting judgment-debt. A judgment can only be executed if any part of it is outstanding. If there is no debt to levy for, what is the cause of action? It would be adding to the list of fictitious causes of action if a sham decree could originate a contest as to title to property.

No doubt it may be said that, if the property is assets of the judgment-debtor, it is no concern of the parties having no sort of interest therein whether the judgment-debt is a sham or genuine one; but when property has been released from seizure on the ground that it was not in the debtor's possession direct or indirect, and therefore not leviable by the Fiscal, it surely is incumbent on a judgment-creditor in an action against third parties, at whose instance such an order has been made, to aver and prove that he holds an unsatisfied money-decree as well as that the property he seeks to attach is assets of his debtor liable to be levied thereunder.

I am prepared to give plaintiff liberty to amend his plaint, as indicated, on payment of the costs of the argument on the 8th February last. As the learned Judge gave him no option in the Court below, I think it would be unfair to order him to pay the costs of appeal, as to which no order will be made, if he avails himself of the liberty accorded to him.

Set aside the judgment, with liberty to plaintiff to amend his plaint, as indicated, within fourteen days of the date of our judgment herein on paying respondents' costs as aforesaid. Plaintiff failing so to amend his plaint on terms as aforesaid, and delivering copy of the amendment to respondents' proctor within two days of due entry of the amendment on the record, the action will stand dismissed with costs in both courts.

BROWNE, J.—Under a certain bill of sale and two Fiscal's transfers, Simon, plaintiff avers, was entitled to 2/3 of 1/7 of two allotments of land, and he and the 8th, 9th, 10th, and 11th defendants had prescriptive possession thereof. Plaintiff then avers that he is the decree-holder, and that 8th, 9th, 10th, and 11th defendants, as next of kin who adiated Simon's inheritance, are the judgment-debtors in a certain action, but that the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th defendants, when plaintiff had the lands seized in execution of his decree, unlawfully claimed the same to his damage of Rs. 20. Plaintiff prayed for the usual declaration of liability of the lands to be sold and for damages. The first seven defendants answered, *inter alia*, that the allegations in the plaint do not entitle the plaintiff to the relief prayed for, and at the trial expanded this into the objection that there was no averment that any amount was due to plaintiff on his writ.

This Court has already held this allegation and proof thereof to be as necessary in an action by a mortgagee under sec. 247 of the Civil Procedure Code as in an ordinary hypothecary action (*D. C., Negombo*, No. 574, 2 *C. L. R.* 188, *note*), and in my opinion this is necessary in all actions instituted under the provisions of section 247, as this action is, for the more immediate object of having the land declared liable to be sold in execution, as well as for the lesser object of recovering damages for the wrongful claim.

Whether in the extreme case suggested by Mr. Sampayo, of the writ being paid after the wrongful claim, but writ-holder still desiring to recover damages and suing to recover them alone, it would be necessary to him to make this averment, will properly fall to be considered when such a case shall arise. While agreeing in the views held by my brother Withers in the judgment he has written, I may add that, even in such an action as that suggested, not instituted for the peculiar purpose of

section 247, it seems to me it would be still necessary to aver and prove the existence of an unsatisfied decree, to show that the plaintiff had full right to seize the land at the time when wrongful claim was made to his damage. So that in all cases the averment and proof are necessary.

I agree to the order proposed, considering plaintiff should have had opportunity given him to amend before his claim was dismissed altogether.

Set aside.

———:o:———

Present:—LAWRIE, A. C. J., and WITHERS, J.

(*June* 30 *and July* 4, 1893.)

D. C., Kegalle, No. 160. } JALALDEEN v. MEERAPULLE.

Minor—Claim in execution on behalf of minor—Inquiry into claim—Action under sec. 247 of the Civil Procedure Code—Guardian—Next friend—Practice

A claim on behalf of a minor to property seized in execution can only be made by a duly appointed guardian. In default thereof the minor is not a party to the claim proceedings or any order passed therein, and consequently an action under section 247 of the Code, after the disallowance of the claim, is not tenable, even though it be brought by a guardian appointed by the Court for the purpose.

Certain property having been seized in execution at the instance of the present defendant, who was writ-holder in action No. 406 of the District Court of Colombo, a claim thereto was made by one Segu Ibrahim Odayar on behalf of the present plaintiff, who was a minor. The Fiscal's report of the claim to the Court stated the claimant to be "Segu Ibrahim Odayar on behalf of Kader Tuan Jalaldeen" (*i. e.*, the present plaintiff). Segu Ibrahim Odayar was an uncle of the minor, but had no legal authority as guardian or otherwise. The Court, however, investigated the claim, and by its order of October 14, 1891, rejected the same. On October 27, Packeer Tambi Jayanambu Umma, mother of the minor, filed the plaint in the present action under sec. 247 of the Code, the caption running in the name of the minor "by his guardian *ad litem* Packeer Thambi Jayanambu Umma". She had not then been appointed guardian or next friend, but with the plaint she presented an application to be so appointed. This application was allowed by Court on November 2, and summons in the action was only then ordered to be issued.

The plaint stated that the plaintiff through his uncle preferred the claim. The answer took issue on this allegation, and averred that the claim was made by Segu Ibrahim Odayar without any authority in that behalf, and pleaded as a matter of law that this action was not maintainable.

The learned District Judge upheld this objection, and dismissed the plaintiff's action.

The plaintiff appealed.

Wendt for the appellant.

Bawa (*Senathiraja* with him) for the defendant.

Cur. adv. vult.

On July 4, 1893, the following judgments were delivered:—

LAWRIE, A. C. J.—This case raises more than one question of interest in the law applicable to curators, to guardians *ad litem*, and to next friends.

Though the defendant, who supports the judgment, has not objected to this part of it, I take leave to say that the ruling of the District Judge, that the action was brought within fourteen days of the rejection of the claim, is doubtful. This is an action at the instance of a minor by his guardian *ad litem*. The plaint was filed on October 27, but the appointment of the guardian was not allowed until November 2. The mother of the minor, confident of the success of the application which she intended to make, gave a proxy and filed a libel as guardian some days before she came before the District Judge to be clothed with authority. The date, when she was appointed guardian *ad litem*, and when her plaint was accepted, and when the District Judge allowed summons to issue, seems to me to be the date of the institution of the action; and if so, it was out of time.

The order of the learned District Judge allowing Jayanambu Umma to sue as guardian does not disclose his jurisdiction. It was an order not made under section 481, which requires a petition by way of summary procedure and an affidavit. Even if it had been under section 481, it would seem as if section 582 prevents a next friend appointed under 481 from suing until he gets a certificate. Again, the order of the District Judge was not one made under the first part of section 582, because there it is enacted that no person shall be entitled to institute or defend any action connected with the estate of a minor until he has got a certificate of curatorship. But I presume that the District Judge allowed the appointment under the latter part of section 582, which enacts that on proof that the property is of less value than Rs. 1,000, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute an action on his behalf although a certificate of curatorship has not been granted to such relative. But this order of

November 2, does not recite that on enquiry the District Judge found that the property was under Rs. 1,000, and that he had any other sufficient reason for making the order.

Next, as to the merits of the case. Property belonging to a minor was seized in execution on a judgment against a stranger. The minor himself plainly had no status to claim or object. His uncle, who had not been appointed his guardian by any Court, and who was not his natural guardian (for his mother was alive), made a claim on his behalf, and that claim was rejected.

It is clear that an officious friend or anxious relative, acting as an amateur guardian, cannot bind a minor. His success may benefit, but his failure cannot harm him. Here the claim of the uncle was disallowed; and fearing lest the order should be held to be conclusive against the minor, this action was instituted in his (the minor's) name.

I affirm the judgment, dismissing the action, because the minor was not a party to the claim proceedings; and if he was not a party, he was not bound and concluded by the order passed, and it is only on the footing that he would have been concluded after fourteen days that the actian is tenable; and, as I hold that the minor would not have been bound, I hold that he had no cause of action against the defendant, who is entitled to be relieved of an action brought by one whom he had frightened but not hurt.

The action is dismissed. The costs of the defendant should be paid by the guardian.

WITHERS, J.—I agree with the decision of the Chief Justice dismissing the action with costs and ordering the guardian *ad litem* to pay those costs.

The minor, in whose behalf this action is instituted, cannot be said to be the party against whom the order on the claim was made under section 244 of the Civil Procedure Code. Nor can the Court's allowance of the institution of this action by the guardian *ad litem* on the application by the minor's mother to be appointed a guardian *ad litem*, for the purpose of bringing this action, be said to confirm the uncle's authority to make the claim on the child's behalf in the former proceedings, and thereby to constitute the child a party against whom the order referred to was made.

Affirmed.

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Present:—LAWRIE, A. C. J, and WITHERS, J.

(*September* 22 *and* 26, 1893.)

D.C., Colombo, No. 1,973 C. } JAFFERJEE v. THE MUNICIPAL COUNCIL OF COLOMBO.

Notice of action—"Place of abode"—"Agent or attorney in the cause"—Municipal Councils Ordinance, No. 7 of 1887, section 278.

Under section 278 of the Municipal Councils Ordinance, 1887, when the notice of action thereby required is given by a proctor on behalf of the intending plaintiff, it is not necessary that the proctor of the plaintiff in the action, when brought, should be the same as the proctor giving the notice, provided the latter had at the time authority to give such notice.

A notice given by a proctor by means of a letter headed "Colombo", and signed by him as proctor for the party on whose behalf the notice is given;—

Held, to be a good notice as stating with reasonable certainty the place of abode of the proctor as required by the above section.

This was an action against the Municipal Council of Colombo, to recover damages caused to plaintiff's horse and carriage by the negligence of the Council's servants in felling certain trees growing by the roadside. Among other defence, the Council pleaded the absence of the notice of action required by section 278* of the Municipal Councils Ordinance No. 7 of 1887.

At the trial the question of notice of action was tried as a preliminary issue, when the following notice was proved to have been duly served on the defendant Council:—

"Colombo, October 5, 1891.

"To the Municipal Council,
Colombo.

"I am instructed by Mr. Carimjee Jafferjee, of No. 18, Fourth Cross Street, Pettah, Colombo, to give you

* Section 278 is as follows:—
"No action shall be instituted agiust the Municipal Council, or any councillor or chairman, or any of the officers of the Council, or any person acting under their or his direction, for anything done or intended to be done under the provisions of this Ordinance until the expiration of one month next after notice in writing shall have been given to the defendant, stating with reasonable certainty the cause of such action, and the name and the place of abode of the intended plaintiff and of his attorney or agent in the cause; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so delivered; and unless such notice be proved, the Court shall find for the defendant, and every such action shall be commenced within three months next after the accrual of the cause of action and not afterwards; and if any person to whom such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover in any such action when brought, and the defendant shall be entitled to be paid his costs by the plaintiff; and if no such tender shall have been made it shall be lawful to the defendant in such action, by leave of the Court where such action shall be pending, at any time before issue framed, to pay into Court such sum of money as he shall think fit, and thereupon such proceedings shall be heard as in other cases where defendants are allowed to pay money into Court.

notice that he will institute an action against you in the District Court of Colombo for the recovery of Rs. 200, as damages for the injuries done to his carriage and horse on September 9 last by the fall thereon of the branch of a tree at Keyzer Street, Pettah, through the negligence of certain servants of the Municipal Council who were then engaged in cutting down trees on the side of the road.

I am, Sir,

Your Obedt. Servant,

CHAS. ALEX. DE SILVA,

Proctor for Carimjee Jafferjee."

The plaintiff's proctor in the action was not Mr. de Silva who had signed the notice, but Mr. Charles Perera.

The District Judge held the notice bad, for not giving the name and place of abode of plaintiff's attorney or agent in the cause, and dismissed the action.

The plaintiff appealed.

Dornhorst (*Sampayo* with him) for the appellant. It is submitted that this case has been prematurely decided, because it was incumbent on the defendant Council to prove that the act done or intended to be done was done or intended to be done under the provisions of section 278 of the Ordinance No. 7 of 1887. The Court must then find whether or not the notice was good. The learned District Judge held that the notice was bad, because it did not give the name and place of abode of the attorney at law. The question is, whether "attorney" in the above section means attorney at law, or attorney as opposed to "agent". It is submitted that the full requirements of the Ordinance have been complied with. The proctor who instituted the action is other than the one who sent the notice, but a man is not limited to the same proctor. The District Judge's construction of section 278, it is submitted, is wrong. The object of the statute is to give defendant an opportunity of knowing where the plaintiff is to be found, so as to enable him to tender amends to the plaintiff. If the name and place of abode of the plaintiff only is given, it is sufficient. The Ordinance enacts that the notice should state the name and place of abode of the intended plaintiff *and* of his attorney or agent in the cause. It is submitted that the Court will read the word "and" as "or" In *Wood* v. *Folliott* (3 B. & P. 551, note (a)) the test as to sufficiency of notice was, "would a letter by post have found the addressee?" The same test, it is submitted, should be applied in this case. It would have been open to the defendant Council to prove that the address given was insufficient for the purpose of the Ordinance: *Osborne* v. *Gough*, 3 B. & P. 550. There might be no attorney at all: plaintiff might sue in person. How then could the attorney's abode be given? In *Morgan* v. *Leach*, 10 M. & W. 558, the notice was signed by the plaintiff and endorsed by the attorney; the contents of a notice of action ought not to be scanned very closely, provided it fairly complies with the requirements of the law: it ought to be liberally construed: *Jones* v. *Bird*, 5 B. & Ald. 844; *Howard* v. *Remer*, 23 L. J. Q. B. 62; *Engleheart* v. *Eyre*, 2 Dowl. 145; *Roberts* v. *Williams*, 2 C. M. & R. 561; *De Gondouin* v. *Lewis*, 10 A. & E. 117.

Wendt for the defendant. The appellant cannot be heard to say the case was prematurely decided. Parties were agreed as to the terms of the notice served, and the Court, regarding the sufficiency of that notice as a question of law going to the root of the action, proceeded by agreement to try it first under section 147 of the Code. The notice of action was bad. The Ordinance requires the notice to give certain particulars for the protection of the Council. If some of those particulars be omitted, the notice is defective; the Court cannot inquire whether the omission did or did not prejudice the defendant in this instance. The words "in the case" mean the intended cause, and apply as well to "attorney" as to "agent". "Attorney in the cause" could only mean in Ceylon a proctor. This action was brought by a proctor, and the notice does not set out so much as his name. It may well be that the Legislature intended to make employment of a proctor compulsory, as a further protection to the Council, which might experience great difficulty in communicating with a plaintiff residing in some village to which there was even no postal delivery. "And" cannot therefore be read as "or". But even regarding a plaintiff as at liberty to give the notice by one proctor and sue by another, the notice fails for not giving the place of abode of the proctor signing the notice. There is nothing to indicate where he resides, or even carries on business. In *Taylor* v. *Fenwick* (3 B. & P. 553 n.) a notice running "given under my hand *at Durham*" was held not to specify any address of the attorney signing it, but merely the place of signing, and Lord Mansfield said: "In words he must tell you his place of abode". Here "Colombo", besides being very vague in itself, merely indicates where the letter was written from, not a place where the writer might be found for receiving a tender of amends. The postal delivery

test is fallacious: if "Colombo" too had been omitted, a letter directed to the proctor might have found him in time; but defendant is not bound to resort to a letter, or the post. He must be able to go at once to the place mentioned and tender amends. The attorney is not said to be "of Colombo" (as in *Osborn* v. *Gough*), nor is his place of business given, as it was in *Roberts* v. *Williams*, thus: "Edward Jones, Record Street, Ruthin, Denbighshire, attorney for the said Robert Roberts." The cases extending a liberal construction to the statement of the "cause of action" in a notice scarcely apply. A defendant may be supposed to know something of his own wrongful acts and omissions, but the same cannot be said of the address of parties aggrieved thereby or of their lawyers.

Dornhorst, in reply.

Cur. adv. vult.

On September 26, 1893, the following judgments were delivered:—

Lawrie, A. C. J.—In this matter I cannot express myself better than in the words of Addision on Torts (6 Ed.) p. 783: "When the Statute requires "the name and place of abode of the solicitor of the "party giving the notice to be endorsed on the "notice, any material error or misstatement cal- "culated to mislead will invalidate the notice, but "if the information given is sufficiently specific and "sufficiently accurate to enable the defendant to "avail himself of the privileges and advantages "that the Act intended to confer upon him, it will "be sufficient: and it is for the defendant to show "that the error or misstatement or insufficient "description in the notice has deprived him of the "opportunity of taking advantage of the Statute"

The notice A, in my opinion, fulfils these requirements. It seems to me that it was a good notice when it was sent. It was signed by Mr. de Silva, who at that time was the attorney or agent in the cause. It is not contended by the defendant that Mr. de Silva was not the plaintiff's proctor on October 5, 1891. In support of an objection that no legal notice was given (and that is the defence here) it is irrelevant to aver that the plaint presented on December 8, 1891, was not signed by Mr. de Silva: that may have been ground for objecting to the plaint; but the plaint was received without objection and no objection is taken to it in the answer, and that Mr. Charles Perera presented and signed the plaint seems to me no valid objection to the notice which, at its date, was a good notice giving the name of the gentleman who at that time was truly the plaintiff's agent in the cause. Besides, the notice may give the name of either the attorney or the agent in the cause. This, I think, clearly shows that an attorney other than the proctor who afterwards conducts the case may be named. We have no reason to doubt that Mr. de Silva was on October 5 and (for aught that appears) remains to this hour the plaintiff's attorney. For these reasons I cannot agree with the learned district judge in sustaining the objection and in dismissing the action.

Another difficulty which is not dealt with by the district judge was pressed on us by Mr. Wendt, and that is, assuming that Mr. de Silva was either the attorney or agent in the cause, still his place of abode is not stated. When a notice is in the form of a letter to the defendant and when that letter has at top of the page the name of a place and at the end the signature of "A. B. proctor" I would have no difficulty in holding that the place must be read as place of abode of the man who signs it. If here the letter had begun "30 Union Place, Slave Island, Colombo" I conceive there would be no difficulty in sustaining that as an ample description of the place of abode: it need not be repeated in the body of the letter nor below the signature. The only difficulty which I have felt is not as to the part of the letter where the place of abode is stated but whether "Colombo" is a sufficient description. Colombo has a large population of which it seems to me the de Silvas form a large part, but this member of that numerous class is identified both by his two Christian names and by his profession. "Charles Alexander de Silva, proctor, Colombo" seems to me a sufficient compliance with the Ordinance, because there could be no difficulty in finding out the house or office of this proctor. Even "London" may be a sufficient description of "place of abode," provided there be no doubt of the identify of the person. For instance, the Duke of Devonshire or the Right Honourable W. E. Gladstone, London, would be quite a sufficient address, whereas Mr. J. Smith, London, would not be an address at all.

I am of opinion that the notice was sufficient to enable the defendant corporation to avail itself of the privileges which the Ordinance intended to confer on it, and I would set aside the judgment and send the case to the district court to be proceeded with according to law.

Withers J.—I do not think it is open to us to consider the question whether this action is for something done or intended to be done under the Municipal Councils Ordinance, No. 7 of 1887. We have solely to determine whether the notice given to the defendants of this action complies with the re-

quirements of section 278 of that Ordinance. It runs thus:—

"Colombo, October 5, 1891.

"To the Municipal Council,
Colombo.

"I am instructed by Mr. Carimjee Jafferjee of No. "18 Fourth Cross Street, Pettah, Colombo, to give "you notice that he will institute an action against "you in the district court of Colombo for the recovery "of Rs. 200 as damages for the injuries done to his "carriage and horse on September 9, last, by the fall "thereon of the branch of a tree at Keyser Street, "Pettah, through the negligence of certain servants "of the Municipal Council in cutting down trees on "the side of the road.

"I am,
"Sir (*sic*)
"Your obedient servant,
"Chas. Alex. de Silva,
"Proctor for Carimjee Jafferjee.'

Now, without any want of respect for the arguments pressed by Mr. Dornhorst or the authorities cited by him, I think the only course for us to pursue is to decide whether this notice is a substantial compliance with this Ordinance. I say so, because the language of this Ordinance differs materially from the language of the Acts in the cases cited by Mr. Dornhorst, which consequently are of little use to us. I quite subscribe to the doctrine of those cases that notices of action are not to be construed with extreme strictness, to use the words of my Lords of the Privy Council in their judgment in the case of the *Union Steamship Company of New Zealand* v. *Melbourne Harbour Trust Commissioners* reported in 53 L. J. P. C. 60. The principal objections raised to this notice by Mr. Wendt, who appeared for the respondent Council, were that the place of abode of the injured person's attorney or agent in the cause were not stated in the notice with reasonable certainty as required by the Ordinance, and that the person who signed the notice as proctor for the injured person, Carimjee Jafferjee, was not his agent in the present cause. Mr. Dornhorst argued as to the first objection that the notice of action under the Ordinance did not require the name and place of abode of the intended plaintiff and his attorney or agent in the cause, and that the place of abode of the plaintiff's attorney, C. A. de Silva, was indicated with reasonable certainty. It was sufficient, he said, if the name and place of abode of the intended plaintiff was indicated with reasonable certainty, and that "and" was to be construed as "or."

But I think the Act must be construed to mean what it says, and that the place of abode of the attorney or agent in the cause must be specified with reasonable certainty as well as the place of abode of the intended plaintiff. It is idle to enquire why the Ordinance requires both to be given, though it is easy to guess why it should have done so. As to that part of this objection I am against Mr. Dornhorst.

Is the place of abode indicated with reasonable certainty by the name of a town in the right hand corner at the top of the notice? Does that reasonably mean more than that the letter was written in the town of Colombo, or may it reasonably mean that it was the place of abode of the writer? With no little hesitation I come to the conclusion that it does express the place of abode with reasonable certainty, and I come to this conclusion under the influence of the doctrine that notices of the kind should not be construed with severe strictness.

I am disposed not to agree with Mr. Wendt in his contention that the agent in the cause must be the agent in the intended cause. It is this contention which has commended itself to the learned district judge. I think that the words "attorney or agent in the cause" mean the attorney, *i. e.* agent, in the cause, and that by "agent in the cause" is meant agent in the cause of complaint authorised by the injured person to give due notice of the action and, therefore, a person legally qualified to give notice of an intended action. I do not see why this agent so authorised is to be taken to be the agent who is authorised to prosecute the intended action on behalf of the intended plaintiff. For these reasons I am for setting aside the judgment of the court below.

I can only express my surprise that the proctor who signed this notice was not careful to indicate his place of abode in the clearest possible terms with the Ordinance before him.

Set aside.

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Present:—Withers, J.

(*September* 14 *and* 19 1893.)

C. R. Chilaw, No. 925. } Ameresekere v. Kirimenika.

Fiscal's sale—Civil Procedure—Material irregularity in publishing and conducting sale—Injury—Civil Procedure Code, section 276, 282.

To entitle a party to set aside a fiscal's sale on the ground of material irregularity in the publication or conducting of the sale under section 282 of the Civil Procedure Code, it must be shown that the substantial injury alleged to have been sustained arose directly from the irregularity complained of.

This was an application by the defendant under section 282 of the Civil Procedure Code to set aside a sale on the ground of a material irregularity in publishing and conducting it. The commissioner, after hearing evidence, set aside the sale. The plaintiff appealed.

Jayawardene, for the appellant.

Cur. adv. vult.

On September 19, 1893, the following judgment was delivered:—

WITHERS J.—The order setting aside the sale in execution of the judgment recovered by the plaintiff in this action is wrong and must be vacated.

The execution-debtor's petition disclosed no material irregularity in publishing or conducting the sale. Before an execution-debtor can have a sale in execution set aside, he must not only prove a material irregularity in the publication or conducting of the sale, but he must satisfy the court that he has sustained substantial injury by reason of such irregularity. It may be true, as the commissioner has found, that the petitioner's share of land was sold for much less than its value, but you cannot infer from that fact the occurrence of substantial irregularity; you must prove both the material irregularity and the material injury and connect the two as cause and effect.

Set aside.

———:o:———

Present :—LAWRIE, A. C. J., and WITHERS, J.

(*September* 22 *and* 26, 1893.)

D. C. Batticaloa, No. 795. } MATHAR SAIBO v. CROWTHER.

Civil Procedure—Summary procedure on liquid claims—Leave to appear and defend—Objection as to regularity of procedure—Service of summons, insufficiency of—Civil Procedure Code, Chapter liii.

In an action under Chapter liii of the Civil Procedure Code—

Held, (following *D. C. Galle,* No. 1,545, 3 C. L. R. 11) that, before the defendant can be heard to object to the procedure, he must obtain leave of court to appear and defend.

Held, per WITHERS, J., that, where there has been insufficient service of summons on a defendant, such irregularity is cured by his appearance, and that if the service of summons is insufficient the defendant need not appear but should, if judgment is signed upon irregular service, apply then to have the judgment set aside.

The plaintiff sued on a promissory note and adopted the summary procedure on liquid claims under Chapter liii of the Civil Procedure Code. The defendant appeared by a proctor and objected to judgment being entered on the grounds that the affidavit filed with the plaint was insufficient and that, the defendant being a Tamil man, no translation in Tamil of the summons was served on him.

The district judge entered judgment for the plaintiff, and the defendant appealed.

Sampayo, for the appellant.

Wendt, for the plaintiff.

Cur. adv. vult.

On September, 26, 1893, the following judgments were delivered:—

LAWRIE, A. C. J.—I adhere to the judgment in *D. C. Galle, No.* 1,545, reported in 3 C. L. R. 11.

I find that in that case we read the Ordinance more strictly that the district judge of Colombo did in Nos. 491C and 492C of the district court of Colombo in judgments which were varied by this court on February 20, 1891*, for reasons which rather support the views pressed on us by the counsel for the defendant in this case. There, on a motion for judgment on a summons under Chapter liii, the defendant filed an affidavit and moved to appear and defend. The district judge characterized the affidavit as vague and as disclosing no defence on the merits, but in addition to the defence set out in the affidavit the defendant's counsel took objection to the procedure adopted by the plaintiff and the objection seemed to the district judge so well founded that he refused the plaintiff's motion for judgment and ordered the action to proceed under the regular procedure. The district judge added "under this order it is unnecessary to consider the defendant's motion for leave to appear", and he gave no costs for the reason stated before as to the nature of the defendant's affidavit. The defendant appealed on the question of costs. CLARENCE and DIAS, JJ., held that the defendant was within his rights in taking the objection and that there was nothing to take the matter out of the general rule that costs follow the event.

Notwithstanding the respect which I feel for the judgment of these two learned judges, I venture to think that the judgment of my brother WITHERS and myself in the Galle case already cited is more consistent with the right reading of the Ordinance and I am for affirming the judgment.

WITHERS, J.—This is an action by the payee of a promissory note against the maker. The plaint was supported by an affidavit that the claim was justly due. Plaint and affidavit having been entered, the court ordered a summons to issue conforming to

* Reported 9 S. C. C. 126.—ED.

that prescribed for summary procedure for liquid claims by Chapter liii of the Civil Procedure Code.

The summons required the defendant to obtain leave from the court within four days from the service thereof to appear and defend the action and informed him that leave to appear might be obtained on an application to the court supported by affidavit of merits or facts disclosing reasonable grounds that he should be allowed to appear in this action.

Service of this process on the defendant was reported as having been effected on March 25. On March 30, after the period fixed by the summons, Mr. Proctor Suppramanian filed his proxy for the defendant and urged objections partly going to the insufficiency of the service (an irregularity cured by his appearance) and partly going to the propriety of the order allowing summons to issue in the form of summary procedure for liquid claims prescribed by Chapter liii of the Civil Procedure Code.

The objection which suggested the impropriety of the order was the insufficiency of the affidavit. I cannot understand, in view of the provisions of Chapter liii, how the learned judge listened to defendant's proctor when his client had not appeared by leave according to the exigency of the summons. The defendant on March 30 was in default of appearance. He had not been given leave to appear even to protest against the authority of the court to order a summons as for a liquid claim under Chapter liii. His proctor's unauthorised appearance could give him no status. Treating this as a case of implied leave to protest against the authority of the court to order summons in the form prescribed by Chapter liii on the ground that the plaintiff's affidavit did not comply with the requirements of section 705 of the Code and that without such affidavit no summons of the kind could be ordered, I can only say that I think that the affidavit does sufficiently comply with the Code.

Again, if this is to be regarded as a case of implied leave to object to the insufficiency of the service as well as to the propriety of the order, I think the learned judge's reasons for refusing to give them effect were right.

To entertain objections of this kind is to defeat the very object of this Chapter which is to prevent unreasonable delay in the recovery of claims of the kind specified therein. If it is permissible to put in a *quasi* defence otherwise than on merits under this Chapter, it should be done only on leave of the court after good cause shewn by the applicant for leave to appear and put in such a defence.

If a defendant has not been well served, why does he appear? and if judgment is signed for the plaintiff upon and after irregular service, why does he not then come forward and apply to set the judgment aside, because procured upon irregular service.

I am for affirming the order with costs.

Affirmed.

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Present:—WITHERS and BROWNE, JJ.

(*October* 27, *and November* 3, 1893.)

D. C. Batticaloa, No. 827. — MEERAPULLAILEBBE v. NOOHOOLEBBE.

Civil Procedure—Summary procedure on liquid claims—Action on foreign judgment—Civil Procedure Code, sections 42, 49, 55, 92, *and Chapter* liii.

An action on a foreign judgment cannot be brought under the provisions of Chapter liii of the Civil Procedure Code, entitled "of Summary Procedure on Liquid Claims."

If in an action under this Chapter, the plaint and summons are not in accordance with the forms indicated in section 703, a decree in default, under section 704, would be set aside on due application after notice; but the more prudent course for a defendant served with a summons under this Chapter, if advised that the plaint and summons did not disclose a case appropriate to this Chapter, would be to move the court on notice for leave to appear and apply that the order allowing that special kind of summons to issue should be discharged.

This was an action institued under Chapter liii of the Civil Procedure Code on a judgment obtained on February 10, 1893, by the plaintiff against the defendant in the district munsiff's court of Srivackatham in the district of Tinnevelly in the Madras Presidency of India, for the sum of Rs. 1,255, which defendant was decreed to pay to the plaintiff within one month from date of the judgment. The plaint averred that the defendant failed to pay the amount within the time decreed, and there was accordingly due the sum of Rs. 1,280 and interest on Rs. 1,255 at the rate of one per centum per annum. Summons was served on the defendant calling upon him within four days from the service thereof to obtain leave to appear and defend the action. The defendant appeared within the time and took exception to the procedure. It was contended on his behalf that a foreign judgment did not come within the purview of section 703 of the Code. The district judge overruled the objection and entered judgment for the plaintiff. He had some doubt as to Chapter liii covering a claim like the present, but as defen-

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dant did not appear and ask for leave to defend, but raised technical objections, he thought it would be allowing defendant to take an undue advantage of the court if he were permitted to discuss further the applicability of Chapter liii.

The defendant appealed.

Wendt (*VanLangenberg* with him) for the defendant. The district judge was wrong in refusing leave to defend and in entering up judgment for plaintiff. A foreign judgment cannot be included within the description in section 703 of obligations which may be enforced by the summary procedure. Section 705 contemplates the existence of an "instrument," upon which plaintiff sues, and his affidavit must establish an indebtedness "thereon." The court has to examine the "instrument" as to due stamping, alterations, erasures, &c. Reading these requirements with the enumeration of obligations in section 703, it is submitted that the intention was to require in every case a document importing debt and signed by the defendant—somewhat in the same way as in the old process of namptissement. It was not necessary that defendant should have obtained leave to defend before he could have taken this objection, for the terms of section 704, requiring such leave, make compliance with section 703 a condition precedent to throwing the burden on defendant. Here the summons did not conform to Form No. 19, because the blank for amount of costs claimed was not filled up. The defendant was therefore entitled to defend as a matter of right.

Dornhorst, for the respondent. Whether a foreign judgment be or be not admissible under this Chapter, it is submitted that, the court having granted the special summons, the defendant cannot be heard until he has obtained leave to *appear* (section 704). This was settled by *D. C. Galle* No. 1,545, 3 C. L. R. 11, which was approved in two more recent cases *D. C. Colombo, No.* 3,753C (Civ. Min. of S. C., Sept. 26, 1893.) and *D. C. Batticaloa, No.* 795, *ante* p. 31. But assuming defendant can be heard without leave, the objection is a bad one. A foreign judgment fairly comes within the language of section 703. No signature of defendant is necessary: that was required in namptissement, because defendant was cited simply to admit or deny his signature. But now under the Code, a plaintiff is not required to pledge his oath that defendant signed the obligation, but only that "the sum which he claims is justly due." All that is required is an obligation for a liquid amount, and a judgment does create an obligation. It establishes a liquid debt: Bullen and Leake, *Pleadings*, 2nd. Ed., 167; *D. C. Kandy, No.* 1,568, 9 S. C. C. 13. The action was therefore rightly brought under Chapter liii.

Wendt, in reply.

Cur. adv. vult.

On November 3, 1893, the following judgments were delivered :—

Withers, J.—According to the plaint filed in this case defendant was sued for a debt arising on a foreign judgment recovered against him by the plaintiff in a court of civil jurisdiction in the Madras Presidency, and the summons was taken out by the plaintiff on April 22, 1893, as if in an action instituted under Chapter liii of the Civil Procedure Code, entitled "of summary procedure on liquid claims". But such summons should not have been taken out without the express order of the court, entered in the journal and signed and dated by the judge (see sections 92 and 55 of the Civil Procedure Code). No plaint should be admitted and filed without the express order of the judge signed and dated by himself—an order which should be minuted in the journal required to be kept by section 92 before referred to; and no summons should be allowed to go out till a plaint has been duly filed, and the copies or concise statements required by section 49 of the Code have been presented (see sections 49 and 55 of the Code). Had the judge given full consideration to the plaint before he admitted it, it is probable that, in view of the remarks in his order appealed from, he would not have directed the issue of summons under Chapter liii. And I do not feel at all certain that when he wrote and signed the order for the reissue of summons on May 2, 1893, he was aware of the nature of the summons which had been issued in the first instance. A summons, however, in that particular form was reissued returnable on May 9. On May 9, defendant appeared by his proctor Mr. Suppramanian, who tendered a proxy from his client, upon which by order of court the case was ordered "to lie over for the 12th instant to give the defen- "dant four clear days allowed by the notice to appear "and ask for leave to defend the action." This is a mistaken view of the summons, which required the defendant to obtain leave from the court to appear and defend the action within four days after the service of summons. On May 12, Mr. Suppramanian for the defendant was allowed to take exception to the procedure adopted without any protest from the court or the plaintiff's counsel who was heard *contra*. The judge, properly I think, paid no regard to any of the objections except an important objection that the judgment of a foreign court does not come within the scope of section 703 of the Civil Procedure Code. This objection the learned judge over-ruled, for reasons which do not appear to me to be sufficient, and thereupon passed a decree for the

amount claimed. I am quite prepared to support the order if in my opinion the debt arising from a foreign judgment is one recoverable under Chapter liii. If it is not, I think the order must be set aside, and the defendant allowed a certain time within which, if so advised, to deliver his answer to the court below.

I have had considerable difficulty in coming to a decision on the point whether a foreign judgment is within the scope of section 703 or not. In the course of argument I certainly thought it was not, but I have been considerably exercised by the cases of *Hodsoll* v. *Baxter*, 28 L. J. Q. B. 61, and *Grant* v. *Easton*, 53 L. J. Q. B. 68. The former case went on the language of section 25 of the Common Law Procedure Act 1852, and the latter on the language of Order 3, Rule 6, of the Judicature Acts, the language being substantially the same. There, however, is this noticeable distinction between the wording of our Code and that of the Judicature Acts, viz., that in our Code the words "contracts express or implied" are omitted. Now, a foreign judgment raises no more than an implied simple contract for the sum adjudged to be due, so that I still fail to see how it can come within the terms of section 703.

I am therefore for setting aside the order with costs and allowing the defendant time up to the 15th inst.

The following observations occur to me in this matter. While the plaint and summons are not in accordance with the forms indicated in section 703 of the Civil Procedure Code and do not disclose on the face of them a liquid claim recoverable by way of summary procedure under Chapter liii of the Code, I take it that a decree in default under section 704 of that Chapter would be set aside on due application being made after notice on that behalf. No doubt the more prudent course for a defendant served with a summons under this Chapter, if advised that the plaint and summons did not disclose a case appropriate to this Chapter, would be to move the court on notice for leave to appear and apply that the order allowing that special kind of summons to issue should be discharged.

Browne, J.—Though our Code of Civil Procedure has extended the remedy of summary procedure for debt, beyond that of a bill of exchange to which it is confined in India, to that on a cheque or instrument or contract in writing for a liquidated amount, or on a guarantee relating to any such debt, it has not been extended to aught else, and I fail to see that it is applicable to a claim upon a judgment entered by consent. It is an absolute necessity under section 705 that the original instrument, on which the plaintiff sues, shall be produced to the court for its inspection as to particulars, of which no opinion could be formed by perusal of any copy, and I doubt if the provisions of section 53 are applicable under Chapter liii. There is no such provision as our section 705 in either the Common Law Procedure Act of 1852, sections 25-28, or in the Judicature Acts, Order III, Rules 6 and 7, and Order XIV, and by them the relief was extended to every debt on any contract express or implied, and I therefore regard the cases mentioned by my brother as inapplicable. Here the original judgment has not been and could not be here produced; and to recover this debt, therefore, even if it were *ejusdem generis* with those specified, which I consider it is not, the summary procedure was not applicable, and the action must be remitted to ordinary procedure accordingly, as directed by my brother.

Referring to the effect of former judgments of this Court (*D.C. Batticaloa No.* 795, 3 C. L. R. 31, and *D.C. Colombo No.* 3753C, Civ. Min. of S. C. of September 26, 1893) it should be here repeated that when, and only when, a plaint and summons conform to the precedents Nos. 14 and 19 respectively, a defendant must obtain leave to appear and defend under section 706, ere any application by him can be entertained. He has been duly summoned to obtain leave, and to do so must be his first step. But when the plaint or summons is in form irregular or defective and does not so conform, the defendant need not appear and any *exparte* decree pronounced thereon against him must be set aside. But, if, as is probable, he should desire not to run the risk of failing to set aside the decree, it would always be open to him, on notice thereof previously given, to ask permission to appear specially and move to vacate the order directing the peculiar summons to issue, and for leave to defend as in an ordinary action, on the ground that the plaint was not one to be treated summarily or that no summons in the requisite form had been served on him; and on his making a *primâ facie* case against the propriety of the order for a summons under this Chapter, or shewing he had thus appeared voluntarily without legal obligation to do so, the court might grant his motion. He would not be appearing to pick holes in the mode of service, nor would he thereby touch the merits of the case. Any objection of his to the plaint would be directed against the jurisdiction of the court to grant summary procedure, and any voluntary appearance would be carrying out the purpose of summary procedure by his thus speedily appearing. In the present instance, however, the appellant had not so obtained leave; and had the debt been one for the recovery of which summary procedure was permissible, his "exception

to the procedure adopted" might have been regarded as one which the court could not entertain.

Set aside.

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Present: - LAWRIE, A. C. J., and WITHERS, J.

(*November* 6 *and* 10, 1893.)

D. C. Colombo, (Crown case) No. 2,107. } DAWSON v. VANGEYZEL.

Registration—Chose in action — Assignment—Moveable property—Claim for money—Deed of gift—Ordinance No. 8 *of* 1871, *sections* 2, 3, 7*—Ordinance No.* 8 *of* 1871 *—Land Acquisition.*

"Moveable property" in sections 2 and 3 of the Ordinance No. 8 of 1871, which requires assignments thereof in writing to be registered, means only corporeal things in possession and does not include a claim or right to demand money, which is a *chose in action* within the meaning of section 7 and an assignment of which, therefore, need not be registered under the Ordinance.

The first and third claimants in these proceedings and one Balthazar Mendis were entitled to certain premises, which were acquired by Government under the provisions of the Land Acquisition Ordinance No. 3 of 1876. They appeared before the Government Agent as claimants and agreed as to the amount of compensation and the shares due to each of them, and the Government Agent, on June 26, 1891, made his award accordingly. But before the amount of compensation was paid by the Government Agent, Balthazar Mendis died intestate, having previous to his death, by deed of gift dated September 22, 1891, assigned to the fourth claimant herein the amount of compensation payable to him by the Government. The second and third claimants were the intestate heirs of Balthazar Mendis, and they as well as the fourth claimant laid claim to his share of the compensation. The Government Agent paid the money into court and referred the matter to the court under the provisions of the Land Acquisition Ordinance.

The deed of gift in favour of the fourth claimant was never registered. It purported to "gift assign and grant" to the donee the sum of money due to him as his share of compensation and to empower her "to demand and obtain from Government" the said sum.

An issue was raised in these proceedings between the second and third claimants and the fourth claimant as to whether the deed of gift was valid by reason of non-registration under the Ordinance No. 8 of 1871. The district judge held in favour of the fourth claimant. The second and third claimants appealed.

Wendt, (*Fernando* with him), for the appellants.

Grenier, for the fourth claimant.

Cur. adv. vult.

On November 10, 1893, the following judgments were delivered :—

LAWRIE, A. C. J.—In my opinion sections 2 and 3 of the Ordinance No. 8 of 1871 apply only to deeds which deal with corporeal moveables and that these sections do not apply to assignments of rights to demand money.

Let judgment be entered for the fourth claimant with costs.

WITHERS, J.—I agree. The compensation to be paid by the Government was clearly in my opinion a chose in action, to which by section 7 of Ordinance No. 8 of 1871 nothing in that Ordinance shall apply, so that the omission to register the assignment under the provisions of that and the amending Ordinance No. 21 of 1871 in no way invalidates it. As at present advised I am also of opinion that "moveable property" in section 2 of the Ordinance No. 8 of 1871 answers to what in English law is known as choses in possession, *i.e.* moveable goods of which their owner has actual possession and enjoyment. The appeal must be dismissed with costs.

Appeal dismissed.

———:o:———

Present:—LAWRIE, A. C. J., and WITHERS and BROWNE, JJ.

(*November* 3 *and* 10, 1893.)

D. C. Colombo, No. 2,741 C. } NUGARA v. NUGARA.

Will—Fidei-commissum—Estate for life—Absolute interest—Construction—Husband and wife—Partition.

A joint will of husband and wife, after appointing the survivor the sole heir or heiress of the joint estate, contained the following proviso: "Provided always "that in the event of me [the husband] predeceasing "my said wife she shall only have a life interest in the "said moveable and immoveable property of the joint "estate, except moneys laid out at interest of all which "she shall have full free and absolute control." There was no ultimate devise to any person.

Held, that under the above will the wife, who survived the husband, took an estate for life only.

The joint will of Sophia Nugara, the tenth defendant in this action, and of her husband John Nugara contained the following clause: "We hereby nominate and institute the survivor of us as his or her "sole and universal heir or heiress to all and singular "the property, moveable as well as immoveable,

"which we are now possessed of or may hereafter "be entitled to, nothing excepted: Provided al- "ways that in the event of me the said John Nugara "predeceasing my said wife she shall only have a "a life interest in the said moveable and immoveable "property of the joint estate, except moneys laid out "at interest of all which she shall have free and "absolute control, and in the event of me the said "Sophia Nugara predeceasing my said husband he "shall be at liberty to hold receive possess and enjoy "all and singular the property moveable as well as "immoveable free from all interference whatsoever "and shall also be at liberty to sell mortgage or "otherwise alienate or dispose of the same and also "to sue for and receive the same for his own use "and benefit." The husband predeceased the wife, leaving several children.

John Nugara and the tenth defendant in this action were entitled in the community of property to a certain share in land, which was sought to be partitioned in this action. The plaint set out the terms of the said joint will but, in stating the shares of the several parties, allotted to the tenth defendant an absolute share and not a life-interest merely. The children of the tenth defendant were not named as defendants, but were subsequently added as parties, and a contention arose between the tenth defendant and the added parties, whether the tenth defendant had an absolute title to the share in question or only a life estate. The learned district judge found for the tenth defendant, and the added parties appealed.

Dornhorst (*Weinman* with him) for the appellants.

Wendt (*Layard*, A.-G., and *Peiris* with him) for the tenth defendant.

Morgan (*Seneviratne* with him) for the sixteenth, seventeenth and eighteenth defendants.

Sampayo, (*de Saram* with him) for the plaintiffs.

Cur. adv. vult.

On November 10, 1893, the following judgments were delivered:—

Lawrie, A. C. J.—In a joint will Mrs. Nugara bequeathed every thing she had to her husband. He, on the other hand, "nominated and instituted his wife as his sole and universal heiress to all and singular the property moveable as well as immoveable of the joint estate, provided always that she shall only have a life interest in the said moveable and immoveable property of the joint estate except moneys laid out at interest of all which she shall have full and absolute control."

There were then living a large family of children of the marriage for whom no express provision is made in the will. I read the joint will as one in which each of the spouses with the consent of the other dealt with the whole of the goods in communion. The will clearly provided that in the event of the husband's predecease his wife should take absolutely all the money laid out at interest and that she should have only a life rent of the rest of the joint property. In other words, under the will she got a larger interest in money lent out and a less interest in the rest of the goods in communion than she would have had, had her husband died intestate. I read the will as giving her only a life rent over the whole of the goods in communion. By law she had right to half, but I think she waived her right to the fee of that half in consideration of her getting the whole of the moneys laid out at interest. However, here the children admit her right to a fee of one half of the land in question and only desire a declaration that she has a life rent of the other half. I think that the claim must be sustained, for indeed they claim less than they are entitled to get.

In joining her husband in this joint will Mrs. Nugara deprived herself of the right to elect between the benefits she would get by taking under the will and her legal rights. I understand she has taken probate and has received the benefit of the provisions in her favor. She has approbated the will by taking the whole moneys lent out at interest; she cannot be heard to reprobate the will by claiming more than a life rent of her husband's half of the goods in communion.

I would vary the judgment and give the appellants the costs of the appeal against the tenth defendant. No other costs in appeal.

Withers, J.—This is a partition action, and in respect to the houses and grounds which form the subject of the action we are called upon to state what is the effect of the joint will of the married persons, John and Sophia Nugara, in the events which have happened, viz., of the husband predeceasing the wife, and the wife electing to take the benefit of the will which she joined in signing. In other words, we are invited to declare what interest in the premises as part of the common property of John and Sophia Nugara the latter takes under the will in the events aforesaid. The testamentary intentions of the husband and wife seem to me clearly to be that the latter shall have an estate for life in the premises and no larger estate.

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It was contended that the proviso cited by the Chief Justice in his judgment was a repugnant condition, and could not be admitted to defeat what is alleged to be the device of an absolute estate in the premises. I fail to see that it bears that character; and I would have it declared that Sophia Nugara's estate in the premises, so far as they enter into the common property of her late husband and herself, and so far as his moiety of the common estate is concerned, is one limited to an estate for life.

The appellants are consequently entitled to their costs in appeal from the 10th defendant.

Set aside.

:o:

Present:—WITHERS and BROWNE, JJ.

(October 24 and 27, 1893.)

D. C., Kurunegala, No. $\frac{153}{\text{M }101}$. MEERA SAIBO v. MUTTU CHETTY.

Civil procedure—Mortgage of moveables—Sale of mortgaged property under unsecured creditor's writ—Preference—Claim—Concurrence—Seizure—Jurisdiction—Practice—Civil Procedure Code, secs. 232, 233, 246, 351, *&* 352.

Sec. 352 of the Civil Procedure Code, after providing for several decree holders sharing rateably in proceeds sale of a common debtor's property, enacts, that "when any property is sold which is subject to a mortgage or charge, or for any other reason remains subject to a mortgage or charge, notwithstanding the sale, the mortgagee or incumbrancer shall not as such be entitled to share in any proceeds arising from such sale".

Sec. 232 of the Code lays down the mode of seizure of property deposited in any Court, and provides for the Court determining "any question of title or property arising between the judgment creditor and any other person......claiming to be interested in such property by virture of any assignment, attachment, or otherwise".

Held, that a specific mortgage of moveables by writing, when the goods are retained by the owner, is not such a mortgage or charge as would continue to attach to the goods after a judicial sale thereof within the meaning of sec. 352 of the Code; and that the proceeds of the sale, less due charges of sale and Fiscal's fees, represent the goods as long as they have not been appropriated by an order of Court to the execution creditor.

Held, also, that until the proceeds are so appropriated a mortgagee who has obtained judgment on his mortgage may seize the money, and have the question of preference determined by the Court under the provisions of sec. 232 of the Code.

Nachchiappa Chetty, judgment creditor in action No. 330 of the District Court of Kurunegala, wherein the defendant in this action was also judgment debtor, appealed against an order of the District Court disallowing a claim to preferential payment out of the proceeds sale of certain property belonging to the defendant.

The facts of the case are fully set forth in the judgment of Withers, J.

Dornhorst for the appellant. The appellant is entitled to have his claim (founded on the mortgage) satisfied out of the proceeds sale in preference to the unsecured creditor, the plaintiff. If this be not allowed him, the mortgage is absolutely worthless, for it has been held that he cannot prevent the sale of the mortgaged moveables under the judgment of an unsecured creditor (*D.C., Ratnapura*, No. 225, *ante* p. 7), and when sold, he cannot claim to be paid rateably with the execution creditor, unless he has himself secured a judgment before the execution issued (*D. C., Trincomalie*, No. 23,437, 9 S. C. C. 203). The appellant has made a good seizure under sec. 232, and the Court should now adjudicate on the competing claims.

Wendt for the plaintiff. It is submitted that the property sold was, on appellant's own showing, property "subject to a mortgage or charge", and his claim is therefore excluded by the terms of the proviso to sec. 352 of the Code. The words following, "or for any other reason remains subject to a mortgage or charge", are disjunctive, and it is not necessary to the operation of the proviso that the mortgage or charge should in every case continue after the sale. The Code may have intended a mortgagee of moveables to take the risks attendant upon that class of security, including the risk of its being altogether defeated by a sale. As pointed out in the Ratnapura case cited, the mortgagee should have made his claim to the Fiscal upon the seizure, and asked that the sale be held subject to his mortgage, as provided by sec. 246. There is a failure of proof that the property sold was in fact hypothecated to appellant. The evidence he led before the District Judge does not identify the property sold with that mortgaged to him. His mortgage was of 2 carts and 2 pairs of bullocks, while the Fiscal sold 22 head of cattle and 2 carts among other property.

Dornhorst in reply.

Cur. adv. vult.

On October 27, 1893, the following judgments were delivered :—

WITHERS, J.—In case No. 153 of the lower Court, instituted by Meera Saibo against K. Muttu Chetty, the plaintiff recovered judgment against the defendant for a sum of Rs. 1,635·34, interest and costs,

which was embodied in a decree of the 23rd February, 1892, in execution of which writ issued on the 1st of March following. On the 11th of that month the Fiscal referred to the Court a petition of the appellant Nachchiappa Chetty, in which he as assignee of S. P. S. Walleappa Chetty claimed to have a specific mortgage of two double bullock carts, Nos. 651 and 652, and two pairs of cart bullocks, branded with certain Tamil letters, seized under the writ in this case. As the sale of the articles was to take place the next day at noon, and the matter was not brought forward to the Court till a few minutes before the hour fixed for the auction, the Court declined to enquire into the subject of the petition. The goods, it is alleged, were accordingly sold, and the proceeds deposited in the Kachcheri by the Fiscal under the plaintiff's writ. Other property was sold thereunder till the proceeds realised and deposited on account of the writ amounted to some Rs. 803·93. Later again in the year, on the 6th of September, the lower Court received a notice from the Fiscal requesting that a sum of Rs. 179·79 out of the money deposited under plaintiff's writ might be held subject to the order of the District Court in case No. 330, wherein the appellant Nachchiappa Chetty is execution creditor, having recovered judgment against K. Muttu Chetty, defendant herein, for Rs. 110 odd and interest, on the 6th of April preceding. This was, I take it, a seizure under secs. 232 and 233 of the Code. Memorandum of this notice was made in the journal of this record, and on the 22nd December, 1892, the plaintiff moved for a notice on the appellant Nachchiappa to shew cause why the sum of Rs. 803·93 recovered under his writ should not be paid to him, which was served, and the enquiry was fixed for the 15th March last, but not determined till the 15th May. The appellant claimed to attach an amount representing the price of the carts and bullocks before referred to, as having a preferential claim under his registered mortgage of chattels, and to concurrence in the balance as a judgment creditor.

His claim has been dismissed on the ground that he did not apply to the Court as a judgment holder before realisation of the carts and bullocks, and so far as concurrence goes he is shut out by the provisions of sec. 351 of the Code. So far, I think, the learned Judge is right; but he has further dismissed his claim to preference for the price of the claimant's alleged mortgage of the carts and bullocks on the ground that he is shut out by the provision of the same section, which says "provided that when any property is sold which is subject to a mortgage or charge, or for any other reason remains subject to a mortgage or charge notwithstanding the sale, the mortgagee or incumbrancer shall not as such be entitled to share in any proceeds arising from such sale". But is a specific mortgage of chattels by writing duly registered, when the chattels are retained by the owner, such a mortgage or charge as would continue to attach to the chattels after the sale at a judicial auction? I think not. Then why should not the price of those chattels less due charges of the sale and Fiscal's fees and other legal charges represent the chattels so long as they have not been appropriated to the execution creditor by an order of Court? And why should not the Court in this instance try the question of preference under the provisions of sec. 232 of the Code?

No doubt a mortgagee of moveables has a remedy under sec. 246 of the Code, as indicated by Clarence, J., at p. 111 of 9 S. C. C.; but in case of the seizure of moveables he must be very expeditious to put in a timely claim of the kind. The case referred to in the *Circular* seems to be in point here, and the case referred to in argument of 9 S. C. C. 203 lays down no more than this, that the old Roman Dutch Law rules as to claims in *concurrence* have been superseded by our Civil Procedure Code. Surely sec. 232 conserves any just claim to priority.

Mr. Wendt argued that there was no proof that the carts and bullocks specifically mortgaged to the claimant had been sold under plaintiff's writ in this action. It may be they were not; but the claim has not been fully investigated.

I would remit the case for enquiry and determination of the preferential claim advanced to the (net) price of the alleged mortgages; and as both sides have partially succeeded, I would make no order as to costs.

BROWNE, J.—I agree. The proceeds of the moveables sold should clearly be regarded as representing the mortgage so long as they remain unappropriated (*Ledward's case*, 3 Lor. 49 and 1 Moo. P. C. N. S. 386; *D. C., Kandy*, 53,770, Ramanathan (1872) 23. Sec. 352 makes enactment only respecting rival claims of holders of "decrees for money" amongst whom proceeds of sale are susceptible of being "divided rateably". Moveable property after sale would not remain subject to a mortgage or charge, and the proviso of that section is inapplicable to any question relating to the disposal of the proceeds thereof.

This appellant has effected a seizure, in the form indicated by sec. 232, of these proceeds, being property deposited in a Court; and as he is one who can claim to be interested therein, he can require that his right of priority thereto shall be determined by that Court.

The case must be remitted for enquiry accordingly.

Set aside.

Present:—LAWRIE, A. C. J., WITHERS and BROWNE, JJ.

BONSER, C. J., LAWRIE and WITHERS, JJ.

(November 3, 10, *and* 21, 1893.*)*

D. C., Chilaw, No. 581. VENGADASALAM CHETTY *v.* RAWTER.

Summary procedure on liquid claim—Promissory note—Joint payees and plaintiffs—Affidavit by one plaintiff alone—Civil Procedure Code, sec. 705—*Appeal—Petition of appeal "taken down" by Secretary—Civil Procedure Code, sec.* 755.

Sec. 705 of the Procedure Code requires, in the summary procedure on liquid claims, that "the plaintiff must on presenting the plaint produce to the Court the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon".

In an action by two joint payees of a promissory note against the makers, the affidavit was made by one of the plaintiffs alone.

Held, affirming the order of the District Court, that the affidavit was insufficient.

A petition of appeal was signed by the appellants alone (who had appeared by proctor in the Court below) and bore the following certificate under the hand of the Secretary of the Court:—"The appellants appear before me, and state their wish to appeal in person, as their proctor is laid up ill at Colombo. They also submit the grounds of appeal in writing, being the draft of a petition of appeal settled by an advocate, which are embodied in the form of a petition of appeal, and signed by the appellants before me."

Held (BROWNE, J., dissenting), that this petition complied with the requirements of sec. 755 of the Code.

This was an action instituted under the provisions of ch. liii. of the Civil Procedure Code by two plaintiffs upon a joint and several promissory note which was payable on demand to them or either of them. The affidavit required by sec. 705 of the Code was sworn by the 1st plaintiff alone, who deposed that no part of the debt had been paid to him or his co-plaintiff. The defendants to the action were the surviving maker and the next of kin of the deceased maker of the note, who were averred to have adiated their inheritance from the deceased and to be in possession of his estate. The plaint alleged that "there was due to plaintiffs the amount of the note from the 1st defendant as such maker, and from the other defendants as the legal representatives of the estate of and heirs who had adiated their inheritance from the deceased maker and were in possession of the said estate". On the day named in the summons the defendants all appeared by a proctor, who took exception to the procedure adopted, on the grounds that the affidavit was insufficient, and that while defendants were sued as "legal representatives" there was no averment that they were so appointed by any competent court.

The District Judge dismissed the summons with costs, and referred plaintiffs to the ordinary procedure.

The plaintiffs appealed.

The facts relative to the preliminary objection taken to the appeal are disclosed in the judgments on the point.

The appeal first came, on November 3, before LAWRIE, A. C. J., WITHERS and BROWNE, JJ.

Wendt for the appellants.

Dornhorst, for the defendants, took the preliminary objection that the appeal could not be entertained, the petition of appeal not being drawn and signed by an advocate or proctor, nor taken down by the Secretary of the Court from the mouth of the appellants, as required by sec. 755 of the Civil Procedure Code.

Wendt, contra.

Cur. adv. vult.

On November 10, 1893, the following judgments were delivered on the preliminary objection:—

LAWRIE, A. C. J.—The petition of appeal is signed by the appellants. It bears this docquet signed by the Secretary of the District Court:—

"The appellants appear before me, and state their wish to appeal in person, as their proctor Mr. Ball is laid up ill at Colombo. They also submit the grounds of appeal in writing, being the draft of a petition of appeal settled by Mr. Advocate Wendt (filed herewith) which are embodied in the form of a petition of appeal, and signed by the appellants before me this 26th day of May, 1893.

D. M. JANSZ,
Secretary, District Court."

In my opinion this fulfils the requirements of the latter part of sec. 755 of the Code, and the appellants' counsel should be heard.

WITHERS, J.—A literal observance of sec. 755 of the Civil Procedure Code would require a native of the country ignorant of English to dictate in his own language the particular grounds of appeal, and the Secretary of the Court to take down those words from the mouth of the party desiring to appeal. This would again have to be interpreted by the interpreter into English, which is alone the language of our courts. In this case the appellants expressed to the Secretary of the Court their desire to appeal from the decision, and handed to him a draft petition of appeal signed by Mr. Advocate Wendt as the draftsman. If the Secretary satisfied himself that the person submitting this petition was the party to the cause who desired to appeal, as it is only fair to presume he

did, and if the Secretary as we are assured commited the contents of Mr. Wendt's draft to writing, and if he satisfied himself, as he did, that the party to the cause appellant desired to appeal and to use the grounds committed by his advocate to writing as his grounds of appeal, I think that the spirit of the Ordinance was sufficiently complied with, and I would allow the appeal to be heard.

BROWNE, J.—I have regarded always the strict provisions of sec. 755 as enacted to ensure that past all doubt or question the Supreme Court shall know who is responsible for the averments in and presentation of the petition of appeal, so as to prevent any person not entitled to do so from appealing in another's name, and to ensure that for any contempt or false statement therein some certain person may be made liable.

I do not consider this is attained by persons bringing a written petition, especially if it be not in their language, to the Secretary of the Court. If it were so, there were no need for the strict provision that only one of the two principal officers of the Court should write from an appellant's dictation. And as it was stated in argument in the lower Court that the Secretary had not taken down the petition of appeal from the mouth of the appellant, I consider the respondents' objection should be sustained. On the other questions submitted in argument, I would, as at present advised, be disposed to hold that an appellant could so dictate his appeal even if there be a proctor on the record, for that the object I have stated would be ensured, and this very case, where the proctor was ill in Colombo, is a reason why the rule should be so construed.

The order in question I should have considered to have been one against which an appeal could be preferred and sustained, inasmuch as the defendants neither obtained leave to appear and defend nor moved on notice for leave to appear specially, and apply that the order allowing special summons should be discharged.

I would therefore sustain the objection and reject the petition of appeal with costs.

On November 21 the appeal again came on to be heard on the merits before BONSER, C. J., LAWRIE and WITHERS, JJ.

Wendt for the appellants. It is submitted that the order discharging the summons is wrong. The defendants have not asked for leave to appear and defend. The only other course open to them was to move, after due notice to plaintiffs, to discharge the order allowing the special form of summons under ch. liii., on the ground that a condition precedent to such issue (viz., the verification of the claim by affidavit) had not been fulfilled. (*D. C., Batticaloa*, No. 827, *ante* p. 32.) Defendants did not take that course, but sought to appear without leave and attack plaintiffs' case. They cannot be heard to do that till leave to appear has been given. (*D. C., Galle*, No. 1,545, *ante* p. 11; *D. C., Batticaloa*, No. 795, *ante* p. 31.) But even if defendants be heard, their objection is a bad one. The affidavit of the 1st plaintiff is sufficient. The note is payable to either plaintiff, and 1st plaintiff might have sued alone, in which case his affidavit would have been sufficient. As it is, he swears the debt has not been paid to either, and that satisfied the court *prima facie*. The defendants, now they have appeared, do not set up a discharge of the debt. [LAWRIE, J., referred to *D. C., Colombo*, No. 469 C, 9 S. C. C. 169, as deciding that a corporation could not sue under ch. liii., as it could not make an affidavit under sec. 705.] There the affidavit was that of a stranger to the action: here it is a plaintiff himself who deposes to the debt. [BONSER, C. J.: How can the second set of defendants be made liable on the note? The English law of promissory notes prevails here by virtue of Ordinance No. 5 of 1852, and in England they could not have been sued.] The law of England governs the liability of those who sign and negotiate notes; but our own common law has always been administered as to the liability of those who represent by succession the parties to bills or notes. The same rules are observed as in the case of any other obligation. [BONSER, C. J.: Assuming we hold the affidavit was bad, then the District Judge's order discharging the summons was a right order; and can we set it aside on the technical ground that it was not arrived at by a proper course?] If the affidavit was bad, it must be admitted the order for summons could have been got rid of on proper motion, as pointed out in the cases before cited; but that procedure has not been adopted; and so long as the order for summons stands, a defendant can come in only by showing merits, and getting leave to appear and defend.

Grenier, for the respondents, was not heard.

BONSER, C. J.—In this case the plaintiffs sue as payees of a promissory note. The defendants are the survivors of the two original makers of the note and the heirs of the other makers who are said to have adiated the inheritance.

The plaint was filed under the summary proce-

dure of chap. liii. of the Civil Procedure Code, but it was supported by the affidavit of one only of the plaintiffs. The District Judge issued a summons to the defendants calling on them to obtain leave to appear and defend the action within a limited time. This summons must have been issued *per incuriam*, for this Court has already decided, and in my opinion rightly decided, that the plaint must be supported by the affidavits of all the plaintiffs, if more than one. The defendants did not obtain leave to appear and defend the action, but the defendants' proctor called the learned Judge's attention to the irregularity, and he thereupon dismissed the summons. The plaintiffs appeal against this order.

Mr. Wendt, who argued the case for the appellants, urged that the District Judge had no right to hear the defendants at all, because they had not obtained leave to appear and defend the action and relied on two cases recently decided in this Court, *Carpen Chetty* v. *Mamlan* and *Mathar Saibo* v. *Crowther*;* but he admitted that the order of the learned Judge was correct, and that the summons was improperly issued. In these circumstances, without in any way impugning the authority of the cases cited, it seems to me that the order of the learned Judge cannot be reversed. It is admittedly right in substance, and the utmost that the appellants allege is that it was not arrived at by the right process.

I think that the order of the learned Judge should be affirmed.

For my own part I must confess that I doubt whether the heirs can be rendered liable to payment of this note in an action in the present form, but it is unnecessary to deal with that question in the present case.

There will be no costs of the appeal.

LAWRIE, J.—The Code requires the plaintiff to file an affidavit; and when there are more plaintiffs than one, it is necessary that each should swear that he has not received payment and that the sum sued for is due. When the attention of the District Judge was called to the fact that only one of the two plaintiffs had filed an affidavit, it was right that he should recall a summons which had issued *per incuriam*. The fault was his; and when his conscience was touched, he had the right to recall a summons which he acknowledged had been ordered on an error.

I retain the opinion I expressed in the cases reported in 3 *C. L. R.* 11 and 31. I disregard the so-called appearance of the defendant in the District Court: he had no right to be heard until he had obtained leave to appear.

WITHERS, J., concurred. *Affirmed.*

* *Supra* pp. 11 and 31.

Present:—LAWRIE and WITHERS, JJ.

(*December* 8 *and* 12, 1893.)

D. C., Colombo, No. 2,670 C. } SILVA v. SELLA UMMA.

Arrest—Execution—Mortgage decree—"Sum awarded" over Rs. 200—Judgment reduced by levy to less than Rs. 200—Liability of defendant to arrest—Civil Procedure Code, section 299—Practice.

Under section 299 of the Civil Procedure Code a a judgment-debtor is liable to be arrested under writ against the person for the unsatisfied balance of the judgment, even though such balance is less than Rs. 200, provided the original decree was for a sum amounting to or exceeding Rs. 200.

On January 25, 1893, the plaintiff obtained a decree on a mortgage bond against two defendants for a sum of Rs. 358·25, and further interest and costs of suit, and in default of payment it was ordered that certain moveable property hypothecated with the plaintiff should be sold, and their proceeds applied in payment of the debt, and that, if such proceeds be insufficient for the payment in full of such amount, the defendants should pay to the plaintiff the amount of the deficiency with interest until realization. A writ was issued against both debtors jointly on February 24, and thereunder the property mortgaged was sold, and out of the amount realized a sum of Rs. 283·70 was credited to the plaintiff. On April 13 the Fiscal made further return to the writ, to the effect that he was "unable to find any property of the defendant, moveable or immoveable". Thereafter, on April 20, writs were issued against property and person for the recovery of the unsatisfied balance of the judgment, viz., Rs. 138·50 with interest at 18 per cent. from March 16 and taxed costs Rs. 231·50. Under the writ against person the 2nd defendant was arrested, and brought before the Court for committal.

The learned District Judge discharged the 2nd defendant from arrest, holding that under the form of decree on a mortgagee as above recited the personal judgment or "the sum awarded" must be taken to be the balance amount of the judgment after deducting the amount realized by the sale of the property mortgaged and directed to be first sold by the decree; and that as in this instance such balance was less than Rs. 200, neither of the defendants was liable to be arrested in execution under section 299 of the Code.

The plaintiff appealed.

Sampayo for the appellant. There is no distinction, such as the learned District Judge draws, between a decree in an ordinary action and that in a

mortgage action. In both cases the defendants are primarily ordered to pay the amount of the judgment, and it is in default of such payment that in mortgage actions the mortgaged property is secondarily ordered to be sold. So that it is submitted the learned District Judge was in error in holding that the judgment personally affecting the defendants extended only to the amount left unsatisfied after the realization of the mortgaged property. "Sum awarded" in section 299 of the Code means the amount of the original decree, which in this case was over Rs. 200; and it is submitted that the defendants were liable to be arrested for the unpaid balance of the judgment. This was the construction put upon the analogous provision of the English statute, 7 & 8 Vict., c. 96 s. 57, where the word used is "recovered". He cited *West* v. *Farlar*, 1 E. & E. 179, 28 L. J. Q. B. 81; and *Holbert* v. *Starkey*, 4 H. & N. 125.

Dornhorst for the respondant. The order appealed from is right. In the first place, the writ against person was irregularly issued. It was not shown on the application for the reissue of writ that the plaintiff had in the first instance used due diligence to procure complete satisfaction of the decree, as required by sec. 337 of the Code. Again, the return to the first writ was insufficient and bad, and was not properly verified, inasmuch as the jurat of the affidavit, which was that of a Tamil man, did not state the particulars required by sec. 437 of the Code. Further, it is submitted that the respondent was not liable to be arrested for the judgment, which had been reduced by levy upon the mortgaged property to less than Rs. 200. The provision in sec. 299 of the Code, for the protection of debtors, would be broadly construed, and the Court would look into the real, and not the nominal, amount of the debt. As the District Judge has held, the personal liability of the defendants arose upon the proceeds of the sale of the mortgaged property proving insufficient, and the unsatisfied balance was in reality the "sum awarded". This was the spirit in which the English statute was construed. He cited *D. C., Galle, No.* 20,041, Ram. (1863-68) 48; *Walker v. Hewlett*, 18 L. J. Q. B. 220; *Blew* v. *Steinau*, 11 Exch. 440; *Holdges* v. *Callaghan*, 26 L. J. C. P. 171.

Sampayo in reply.

Cur. adv. vult.

On December 12, 1893, the following judgments were delivered:—

LAWRIE, J.—I agree to affirm. When a judgment creditor holds a decree wherein the sum awarded, inclusive of interest up to the date of the decree, but exclusive of any further interest and exclusive of costs, amounts to above Rs. 200, and when after seizure and sale the Fiscal reports that a partial recovery has been made, which reduces the debt to below Rs. 200, and that he is unable to find any more property of the judgment-debtor moveable or immoveable, then in my opinion the Code permits the Court to issue a warrant for the arrest of a judgment-debtor. In other words, a debtor may be incarcerated for non-payment of a sum less than Rs. 200, provided the decree was for a larger amount. If a man be imprisoned for non-payment of more than Rs. 200, he cannot claim his release as a matter of right until the decree is fully satisfied. A partial payment is not sufficient. But the powers of the Court to refuse to incarcerate or to release after incarceration are large, provided the Court be satisfied that the debtor has no property which can be sold in execution. A penniless and honest debtor who lies in jail has only himself to blame if he does not apply to the Court under the provisions of sec. 306 and subsequent sections of the Code.

Here, while I do not altogether agree with the reasons given by the learned District Judge, I am not disposed to set aside his order and to require him to send the defendant to jail.

The warrant of arrest issued on May 10, 1893, proceeded on the return by the Fiscal dated April 13, 1893, which was a misleading and inaccurate return. It stated that the Fiscal on March 28 was unable to find any property moveable or immoveable of the defendant, but it omitted to state that prior to the service of the writ on March 28 property had been seized and sold. In my opinion a warrant of arrest should not issue, and if issued, should not be followed by the committal of the debtor, unless the procedure required by the Code has been strictly followed.

I may add that in my opinion the writ against property was not in proper form. It ought to have been, in terms of the decree, not an ordinary writ of execution against property, but a special writ to the Fiscal that in default in payment he should sell the mortgaged property described in the decree.

It is also worthy of the attention of district judges whether in cases where there are several judgment-debtors separate writs against each debtor should not issue, instead of, as in the present case, one writ against all.

WITHERS, J.—In my opinion, on the return to a writ of execution against property, in satisfaction of a decree awarding a sum of Rs. 200 and over, that property of a judgment-debtor has been levied as to part of the sum so decreed, and that the Fiscal can find no further property of the debtor out of which to levy

the unsatisfied balance, it is competent to the Court to issue a warrant for the arrest of the judgment-debtor.

In this particular case, however, the return to the writ of April 13 was defective in two particulars. It omitted to mention the fact of a levy on the 1st defendant's property for a sum of Rs. 290, and it did not say as to the 2nd defendant that the Fiscal could find no property of his out of which to levy execution for the balance. At the foot of the return to the joint writ against the two defendants it is stated; "I have been unable to find any property of the judgment-debtor (*sic*) moveable or immoveable." It is not said which debtor; *non constat* that it was the 2nd rather than the 1st defendant. There was, therefore, no such foundation as the sec. 298 of the Civil Procedure Code requires for the issue of a warrant of arrest against the 2nd defendant.

Moreover, the decree required execution against specific moveable as well as specific immoveable property of the two defendants in default of payment of the sum thereby awarded, *i.e.*, Rs. 358·25 with interest and costs (Rs. 250) and thereafter the defendants were ordered to pay the deficiency, if any, after the realisation of those mortgaged properties. The writ was not in conformity with this decree. Before the Court could issue a warrant of arrest against either debtor for a balance, if any, of the sum of Rs. 358·25, it was incumbent on the Fiscal to satisfy the Court that he had first levied on those properties or was unable to do so, by reason whereof payment of the balance could be enforced in the usual way.

For these reasons I think the order appealed from should be affirmed with costs.

Affirmed.

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Present:—LAWRIE, J.

(*December* 14 *and* 19, 1893.)

P. C., Negombo, No. 16,629. } TELASINHA v. GABRIEL.

Appeal—Remarks by magistrate after petition filed—Practice.

The practice of magistrates of appending notes to their judgment after petition of appeal has been filed commented on.

The complainant appealed from an order for compensation, the defendants having been acquitted.

VanLangenberg, for appellant.
Dornhorst for defendants.

Cur. adv. vult.

On December 19, 1893, the following judgment was delivered:—

LAWRIE, J.—This is an appeal from an order of the Police Magistrate that the complainant should pay Rs. 10 to the 3rd and 4th accused, whom the Magistrate acquitted, holding the charges against them to be vexatious.

I have often regretted that the judgment of this Court in *P. C., Matara*, No. 594, decided by FLEMING, A. C. J., and myself on July 24, 1885 (7 S. C. C. 49) was overruled on July 23, 1886, by BURNSIDE, C. J., in *P. C., Batticaloa*, No. 998, reported in 7 S. C. C. 200.

The later decision, though of a single judge, has been followed, and I accept it as law. But though the order to pay as compensation less than Rs. 25 is appealable, I should never exercise the power to set such an order aside when the procedure of the Code has been followed, and when the Magistrate has acquitted after a careful investigation. Here the order seems to me to be fully justified, and I affirm it.

The learned Magistrate, I hope, will not take it amiss if I say that I have not read his memorandum added on November 25, 1893, after the filing of the petition of appeal. An appellant is entitled in his petition of appeal to the last word, and may criticise the reasons given by a judge for his judgment. A judge may not reply by reiterating or expanding or supplementing the reasons for his decree.

Affirmed.

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Present:—LAWRIE, A. C. J.

(*October* 31, 1893.)

C. R., Panadure, No. 1,094. } SOYSA v. DON CHARLES.

Animal—Injury—Liability of owner—Scienter—Animal feræ naturæ—Trespass—Negligence.

Where injury is done by an animal, while trespassing, the owner is liable for the injury, whatever the nature of the animal, and whether or not the owner knows of its vicious propensities. Where, however, the animal is in its proper place, and the injured person has no right to be there, the owner is not liable.

But where neither the animal nor the person injured is trespassing, the liability of the owner depends on the nature of the animal, and on the knowledge of the owner as to its viciousness; that is to say, if the animal is *feræ naturæ*, or, even if it be *mansuetæ naturæ*, of a nature which is uncertain and capricious, the owner is bound to keep it in complete control, and if any injury is done, he is liable; but in the case of a domestic animal the owner is only liable if he knows that it is vicious.

In any of these cases, the liability of the owner is not altered by the fact that the animal is in the custody of a stranger at the time when the injury is committed.

While the plaintiff was driving along a public road in a hackery, a bull belonging to the defendant, and then straying on the road, attacked and gored the plaintiff's animal, whereby the hackery was upset, the plaintiff himself injured, and some property which was in the hackery damaged. The plaintiff sued the defendant for damages. The defendant had given the animal to another person to tend, and it was in the latter's custody at the time of the injury. The learned Commissioner gave judgment for the plaintiff, and the defendant appealed.

Wendt for the appellant.

Sampayo for the plaintiff.

Cur. adv. vult.

On October 31, 1893, the following judgment was delivered:—

LAWRIE, A. C. J.—The liability of the owner of an animal for injury done by it depends, first on whether the animal was trespassing at the time when the injury was done. If it was trespassing, the owner is liable in damages, even if the injury was unexpected and due to propensities of which the owner was in fact ignorant.

It is, I think, different when the animal, however dangerous, was in its proper place when the injury was done. If a man goes into a stable and is kicked or bitten by one of the horses, or if he leaves the road and crosses fields and is tossed or gored by a bull grazing on its owner's land, or if a stranger enters a house without due warning and is bitten by a dog, such persons cannot complain in the same way, nor are they entitled to the same damages, as if the horse or the bull or the dog had got loose and had kicked or gored or bitten the man on his own land.

There is, however, a third class of cases of more difficulty, when neither the animal nor the man injured is a trespasser, and when the injury is sustained at a place where both have right to be. The owner's liability then depends, first, on the nature of the animal, and, secondly, on his knowledge that it is vicious. If it be an animal *feræ naturæ*, or, if it be *mansuetæ naturæ*, of a nature which, though tamed and trained, is still uncertain and capricious, such as an elephant or a buffalo, the owner is bound to take sufficient precautions to keep it in complete control, and if an injury be done, he is liable. But if an animal be domestic, a dog, a bullock, etc., the owner is not liable for injury committed by it in a sudden and unexpected outburst. He is liable only if he knew, or had reason to know, or might by ordinary care have known, that the animal had previously been vicious.

In the case before me the defendant's bull was a trespasser; it had broken loose from the garden where it was tied, and it strayed on the public road, where it had no right to be except under control. The owner is liable for the injury it did when so trespassing. It matters not that the bull was in the custody of a stranger; the owner is primarily liable, though the stranger might have been sued as well as the owner.

The few Ceylon decisions regarding the liability of owners for injury done by their animals are, I think, consistent with the law I have just explained. Mr. Justice Carr, in 1846, held that the owner was liable because he had notice that his buffalo had done previous injury or was accustomed to mischief, and because he did not secure it to prevent a trespass or a recurrence of the injury (*Ram.* 1846 p. 65). In a case decided in 1851 (*Austin's Reports*, p. 153) by the same Judge, the District Judge had drawn a distinction between animals *feræ naturæ* and animals *mansuetæ naturæ*, and had held that for injuries committed by the former the owner was always liable, and for injuries committed by the latter the owner was not liable unless he had notice of the mischievous propensities of the animal or had omitted to take proper caution. The judgment was affirmed by Carr, J., and assessors on the ground, "that if any person be gored by a buffalo on the road the owner of the animal would be liable to make compensation for the injury done to the wounded person, and the owner's liability in such cases would be the same whether he was or was not aware that his buffalo was mischievous and accustomed to gore". If in that case the injured man had been the trespasser, if the buffalo had hurt him in its own field, then I imagine the plaintiff would not have been entitled to damages. The ground of the owner's liability was either that the buffalo was trespassing, or more probably that though it was on a road where it was customary for buffaloes to graze, the owner of an animal, so imperfectly tamed as a buffalo, was liable, because he had not taken complete means to prevent the possibility of its doing harm to passers by.

In an elaborate and learned judgment (*Ram.* 1860 p. 68) Creasy, C. J., held that an owner of dogs of mischievous habits was liable for injury done by them. It does not appear from the report where the injury was done. I think, however, that the dogs certainly were at large, and that the man injured was

not a trespasser. The ground of liability was that the dogs were proved to have been of mischievous habits. That the man did not, in fact, know what the habits of his own dogs were, was immaterial, because he might by ordinary care and enquiry have learned their previous history and character.

There is also a police court case decided by Sir Edward Creasy and Lawson, J., reported in Vand. p. 242, where the court intimated that the complainant had right at common law to charge a defendant criminally with keeping a ferocious dog and suffering it to go at large whereby a child was bitten, the owner being well aware of the dog's ferocious disposition. By the Ordinance No. 9 of 1842 owners of dogs known to be dangerous are liable to punishment in addition to the civil liability.

I affirm the judgment. The owner is liable because his bull committed the injury when it was trespassing.

Affirmed.

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Present :—Lawrie and Withers, JJ.

(*December* 19, 1893, *and January* 19, 1894.)

D .C. Matara, No. 502. } Le Mesurier v. Le Mesurier.

Appeal—Privy Council—Matrimonial cases—Divorce —Value—Courts Ordinance, No. 1 *of* 1889, *section* 42—*Civil Procedure Code* 1889, *sections* 625, 781, 783.

In an action by a husband for divorce from his wife on the ground of her adultery with the co-defendants against whom, however, no damages were claimed, the Supreme Court in appeal dismissed the plaintiff's action. *Held*, that, under the Charter of 1833 and the Courts Ordinance 1889, no appeal lay as of right to the Privy Council from the judgment of the Supreme Court.

Application by plaintiff for a certificate under section 781 of the Civil Procedure Code, preparatory to appeal to the Privy Council.

This was an action for divorce, the husband praying for a dissolution of his marriage on the ground of the wife's adultery with the co-defendants, and for custody of the children. No damages were asked for. The district judge on January 31, 1893, gave judgment for the plaintiff. The Supreme Court (Lawrie, A. C. J. and Browne J.) on appeal by the first and fourth defendants, reversed this judgment on October 20, 1893, and dismissed the action with costs. The plaintiff on December 8, 1893, made the present application by petition, praying for a certificate that as regarded amount, value and nature, his case fulfilled the requirements of section 42 of the Courts Ordinance No. 1 of 1889 or that the case was otherwise a fit one for appeal to Her Majesty in Council.

The petition now came on to be heard.

Dornhorst, for the petitioner.

Wendt, for the defendant took the preliminary objection that no appeal lay to the Privy Council. The Charter of 1833 and the Courts Ordinance, which re-enacted it, do not give power to appeal in matrimonial cases. They provide only for cases in which a money value can be put on the subject of litigation. In two cases from the island of Mauritius, (where the words of the "Charter of Justice" were very similar to those of our Charter) the Privy Council expressly held that no appeal lay in matrimonial cases, the remedy of a party aggrieved being by petition to the Privy Council direct for special leave to appeal. (*D'Orliac* v. *D'Orliac*, 4 Moo. P. C. C. 374, followed in *Shire* v. *Shire*, 5 Moo. P. C. C. 18.) No appeal has in fact ever gone up from Ceylon in a matrimonial action. In *D. C. Colombo*, No. 11,016 (Morgan's Dig. p. 77.) this Court is reported to have said that "in "suits for divorce, although it may appear at "first sight that parties would be without appeal "to the King in Council, where no value appears "as the measure of the injury sought to be "redressed, yet the Supreme Court will supply that "apparent omission by considering every case of this "description as above the value of £500, since ques-" tions of this nature cannot be measured, as to their "importance, by money to any amount." It is clear, however, from the reference to this case in Marshall's Judgments, p. 32, that this was merely *obiter dictum*, the question before the court being as to the jurisdiction of the district court to entertain a suit for divorce.

Dornhorst, contra. Although there has not actually been an appeal in a divorce case, it has always been assumed that such appeals were competent—perhaps under the words "involving some civil right." The Civil Procedure Code, section 781, recognises the power of this Court to grant leave to appeal outside section 42 of the Courts Ordinance, by using the words as to the case being "otherwise a fit one for appeal." The court will, it is submitted, exercise the power in the present instance.

Wendt, in reply. The words "or that it is other-" wise a fit one for appeal to Her Majesty in Council" were supposed by Burnside, C. J., in *D. C. Colombo, No.* C 1,251, 2 C. L. R. 127, to have crept into our Code through inadvertence. They are copied from the Indian Civil Procedure Code, section 600. In India they have a special significance, because there while the value limit for appeals to the Privy Council is Rs. 10,000, the High Court have power

(under section 39 of the Letters Patent dated December 28, 1865, issued under 24 and 25 Vic. c. 104) to grant leave to appeal in any case which they consider a fit one for appeal, although it involves less than Rs. 10,000 in value. (See Macpherson's Privy Council Practice, App. p. 83.)

Cur. adv. vult.

On January 19, 1894 the following judgment was delivered :—

Lawrie, J.—The Charter of 1833 limited the right of appeal to Her Majesty in Council to judgments decrees orders and sentences given or pronounced for or in respect of a sum or matter at issue above the amount or value of £500 sterling or shall involve directly or indirectly the title to property or to some civil right exceeding the value of £500.

In 1836 this Court observed *obiter* that "though "it might appear at first sight that parties in matri- "monial causes were without an appeal to Her "Majesty in Council it would certainly supply that "apparent omission by considering every matrimo- "nial case as above the value of £500."

The Supreme Court of Mauritius seems to have entertained much the same view of its own powers, but in two cases reported in 4 and 5 Moore's Privy Council Cases the Lords of the Privy Council corrected the view and refused to entertain appeals in matrimonial causes from that colony. From the time of these decisions of the Privy Council until the passing of the Ceylon Civil Procedure Code, no doubt seems to have been entertained that appeals to the Privy Council would be presented as of right only in causes involving a sum above Rs. 5,000.

There was, I think, an impression that the Code gave to suitors in matrimonial causes the relief of appeal, and lately when we were asked to grant a certificate in a divorce suit (Samaradiwakare's case)* my brother Withers and I allowed the motion which was not opposed, nor were counsel heard.

In this case, however, the grant of the certificate was opposed and we had the advantage of a full argument. The framers of the Civil Procedure Code seem to have taken for granted that appeals to the Privy Council were competent in matrimonial causes. Section 625 enacts when and how a decree *nisi* for divorce may be made absolute : "Provided that no appeal to Her Majesty in Council has been presented against any such order or decree." That section, however, does not enact an appeal is competent, it merely takes the competency for granted. Then, in a later section (781) it is enacted that, before a decree can be heard by the Supreme Court collectively by way of review, a judge of this Court must give a certificate that the case fulfils the requirements of section 42 of the Courts Ordinance 1889 or that it is otherwise a fit one for appeal to Her Majesty in Council.

Sir Bruce Burnside, Chief Justice, in refusing a certificate in the Tea Roller case, (1 S. C. R. 319 and 2 C. L. R. 127.) was disposed to think that these words "or that it is otherwise a fit one for appeal "to Her Majesty in Council" had found their way into our Code rather through inadvertency than from any deliberate intention. The right of appeal to the Privy Council cannot depend on the terms of a certificate issued under section 781. That certificate relates to whether a case shall be heard in review. It is the judgment of the Collective Court against which an appeal to the Privy Council may be taken, but even then not as a matter of course : the intending appellant must ask this Court for leave to appeal to Her Majesty in Council (see section 783), and in my opinion we are bound to refuse to give this leave unless the sum or matter at issue is above Rs. 5,000. We cannot give the leave merely because we think that the case is otherwise a fit one for appeal.

The result to which I come is that section 781 gives to a judge of this Court discretion to grant a certificate in a case under the value of Rs. 5,000, provided he considers it a fit one for appeal to the Privy Council, and that the judgment of this Court in such a case might therefore be heard in review by the Collective Court. This was done in the Samaradiwakare case. But there the certificate was granted without argument or opposition, and I feel almost certain, had the matter been argued, we should not have granted it, because, though it is of advantage to have an important case re-argued before the Collective Court, we would not put parties to the expense of this second argument in cases where, whatever the result of the hearing in review might be, leave to appeal to the Queen in Council could not be allowed because the case did not fulfil the requirements of section 42 of the Courts Ordinance.

I recommend that the application for a certificate be refused with costs.

Withers, J., agreed.

Certificate refused.

* *D. C. Colombo* No. C 2001, Civ. Min., December 19, 1893.

Present :—Lawrie, J.

(*November* 29, *and December* 5, 1893.)

P. C. Colombo, No. 26,803. } Cave v. William.

Master and servant — "*Journeyman artificer*" — *Machine-ruler—Ordinance No.* 11 of 1865, *sections* 5, 6, 7, 11.

Under the Ordinance No. 11 of 1865 "journeyman artificers" mean all skilled workmen in the regular employment of an employer, who are in law presumed to work by the day or who are engaged for a given time, including those who contract to serve by the month.

machine-ruler in a printing office who has entered into a contract of monthly service is a journeyman artificer within the meaning of the Ordinance.

The defendant was charged with having committed an offence under section 11 of the Ordinance No. 11 of 1865, in that he being a journeyman artificer in the employment of the complainant neglected to attend work on September 12, 1893, during the hours it was usual for him to attend according to his occupation.

The defendant was described as a machine-ru'er employed at the complainant's printing office, his duty being to rule paper in a machine to make account books. His pay in September 1893 was Rs. 17·50 a month.

The magistrate in his judgment held as follows':—"Accused's employment, machine-ruling, requires some skill, though probably not very much, considering what his pay is. "Journeyman artificer" is unfortunately not defined by the Ordinance. I find in 6 S. C. C. 149 a judgment of Justice Clarence in P. C. Tangalla 9,576, where he says 'a journeyman artificer means an artificer in the regular employ of an employer.' Wharton [Law Lexicon] defines a journeyman as a workman hired by the day or other given time,' and 'artificers' as 'persons who are masters of their art and whose employment consists chiefly in manuel labour.' Stroud [Judicial Dictionary] defines an artificer as 'a skilled workman.' According to this, accused is an artificer, as he may fairly be considered a master of the art of machine-ruling, and such ruling is certainly manuel labour. As to his hiring, no special contract has been proved. He was made a machine-ruler at his own request, and both before and after that time has been paid monthly and at a monthly rate. No definite term of service was agreed on, when accused became a machine-ruler. According to this, as accused was not engaged for the day or for a given time, he would be no journeyman, if Wharton's definition holds good. And I do not think that Justice Clarence's definition is inconsistent with this, as I take it 'in the regular employ' means in the usual business carried on by the employer, which in the Tangalla case was not that of machine-ruling. In this view the accused is not a journeyman artificer, because he was never engaged for a given time. Again, by the Ordinance, the engagement of a journeyman artificer according to time is, in the absence of a special agreement, to be taken as a hiring for a day and no more. And even supposing accused's employment could be construed as a hiring for a month certain, there is no provision whatever in the Ordinance deeming such a hiring to be renewed from month to month until determined by notice. Such a provision exists only in the case of servants."

For these reasons the magistrate acquitted the defendant, and the Attorney-General appealed.

Dornhorst, for the appellant.

Pereira, for the defendant.

Cur. adv. vult.

On December 5, 1893, the following judgment was delivered :—

Lawrie, J.—The Ordinance No. 11 of 1865 applies to three classes of earners of wages: *first*, menial, domestic, and other like servants; *second*, pioneers, kanganies and other labourers whether employed in agricultural, road, railway or other like work; *third*, journeyman artificers.

The accused does not belong to either the first or second class. He was neither a servant who lived and worked within his master's house and walls nor an outdoor labourer. Contrary to the opinion of the police magistrate I hold that the accused was a journeyman artificer. A machine-ruler in a printing office is certainly an artificer. The difficulty arises from the use by the Legislature of the prefix "journeyman." Now, although from the derivation of the word and from section 5 of the Ordinance No. 11 of 1865 it is plain that "journeyman artificer" primarily means one who contracts to work for one day and for no longer, it means secondarily artificers who make a special contract or agreement to work for a longer period than one day. Sections 6 and 7 and many other sections of the Ordinance seem to me to show clearly that by such contract he does not lose his designation of "journeyman" nor does he forfeit the privileges nor escape from the penalties of the Ordinance.

In *P. C. Gampola* No. 25,204, November 11, 1873, Grenier (1873) Pt.I p. 98, Sir Edward Creasy, C.J., held that a man was a journeyman artificer although he had contracted to serve for an indefinite period, namely, until he had repaid an advance. If an artificer who enters into such an indefinite contract is liable to punishment imposed on "journeyman arti-

ficers" by section 11, much more is an artificer liable who enters into a definite contract of monthly service.

In a case decided by the same judge on February 11, 1873, *P. C. Galle*, No. 82,758 Grenier (1873) Pt. I p. 13, a lithographing boy was held not tc be a servant or a labourer, but the Court does not seem to have considered the question whether he was a journeyman artificer.

I read the words "journeyman artificers" in this Ordinance as meaning all skilled workmen in the regular employment of an employer who are not indoor house servants, nor out-of-door labourers, who are by law presumed to work by the day for day's wages, including those who legally contract to work and serve for a longer time.

I hold that it is proved that the accused entered into a contract of monthly service and had worked in terms of that contract and had received monthly wages for several years. On September 12, 1893, he without reasonable cause refused to attend at and during the time and hours and at the place where and when he contracted to attend before the end of his term of service without previous warning, as required by section 3 of the Ordinance, and that he thereby committed an offence punishable under section 11 of the Ordinance No. 11 of 1865. The charge should be altered by adding after "journeyman artificer" the words "being bound by contract to serve for the period of one month renewable month by month."

I set aside the acquittal and find the accused guilty of the above offence and sentence him to one week's simple imprisonment,

Set aside.

———:o:———

Present :—Lawrie, J.

(*December* 14 *and* 19, 1893.)

P. C. Kandy, No. 17,435. } Opalangu v. Mudianse.

Cruelty to animals—Cutting with knife a trespassing animal—Ordinance No. 7 *of* 1862.

Cutting and wounding with a knife an animal even while trespassing, where the infliction of such pain is not necessary for the protection of the property trespassed upon, is an offence within section 1 of the Ordinance No. 7 of 1862.

A cow belonging to the complainant with other animals trespassed upon a chena of the defendant, when the defendant chased them. The other animals escaped, but the complainant's cow could not get through the fence and the defendant cut it with a knife on the hind leg, which was so badly injured that after some days it rotted and fell off, and the animal lingered in great pain. The defendant was charged by the magistrate under section 1 of the Ordinance No. 7 of 1862 with having cruelly ill-treated the animal. The defendant was convicted and sentenced to pay a fine of Rs. 40, half of which was directed to be paid to the Society for the Prevention of Cruelty to Animals.

The defendant appealed.

Wendt, for the appellant.

Cur. adv. vult.

On December 19, 1893, the following judgment was delivered :—

Lawrie, J.—In three cases reported in Grenier's Reports for 1873 pp. 9, 62, 85, this Court construed the Ordinance No. 7 of 1862 strictly, and accused who had inflicted pain to animals were acquitted on the ground that there was no proof of the very acts enumerated in the Ordinance, viz., cruel beating, ill-treating, over-driving, abusing or torturing.

In the first of these cases, page 9 (not page 4 as is stated in the foot note to 2 C. L. R. 176) the accused cut a trespassing cow on the hind leg, and it appears from the report that the wound was not very serious, as it was cured before the trial. Stewart, J., held this was not cruelty within the meaning of the Ordinance. Again, on page 62, shooting at and wounding a bullock which was trespassing was held by Cayley, J., not to be cruelty under the Ordinance and a Negombo case decided in 1870 is referred to, in which it was held that the general words of the Ordinance No. 7 of 1862 are restrained by the particular words in the same section and must be taken to mean only such acts of cruelty as are *ejusdem generis* with the specified acts. But I confess I do not understand to what general words reference is there made. Another decision is at page 85 of the same volume of Grenier, where Stewart, J., held that slashing an animal with a knife when it was trespassing was not cruelty or torture as contemplated by the Ordinance. Although I think it probable that the learned judges whose decisions I have referred to would have acquitted a man who cut a cow in the manner and under the circumstances proved in this case, still I do not feel obliged to take the same view as I think they would have taken.

Here I hold it proved that it was unnecessary to cut this cow with a knife: it was easy to drive it out

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of the chena, where though trespassing it had done no harm. The use of a knife was cruelty. So grievous was the cut that the cow's foot rotted off and the beast lingered in great pain. This to my mind was useless cruelty and of a kind which, I venture to think, the Ordinance was passed to prevent and to punish. I affirm the conviction and sentence.

I am not aware of any Ordinance which gives a police magistrate power to allot part of the fine to the Society for the Prevention of Cruelty to Animals, but that is a matter between the police magistrate and Government. If Government is content to forego the fine in favour of the so-called society, it does not affect either the accused or this Court.

Affirmed.

———:o:———

Present:—BONSER, C. J.

(*January* 31, 1894.)

P. C. Galle, No. 11,680 } ARNOLIS v. BABUNHAMY.

Criminal procedure—Several defendants—Frivolous charge —Compensation—Power of magistrate—Criminal Procedure Code, section 236.

Under section 236 of the Criminal Procedure Code, a police magistrate has power to direct the complainant to pay as compensation the sum of Rs. 10 to each of several accused persons.

Kanapatipillai v. *Vellaiyan*, 7 S. C. C. 200, commented on.

The complainant appealed from an order directing him to pay as compensation Rs. 5 to each of five accused persons.

Jayawardene, for the appellant.

The order was affirmed by the following judgment:—

BONSER, C. J.—In this case the only ground of appeal is that the magistrate, having six accused brought up before him and being of opinion that the complaint was frivolous as regards five of the accused, awarded to them Rs. 5 each as compensation under the provisions of section 236 of the Criminal Procedure Code. The appellant urges that the magistrate was not authorised to make such an order and evidently relies upon the observations of the late Chief Justice, SIR BRUCE BURNSIDE, in the case of *Kanapatipillai* v. *K. Vellaiyan* reported in 7 S. C. C. 200. There the late Chief Justice seemed to think that it was a startling result that if there were 100 accused in a case the magistrate should be able to award Rs. 10 as compensation to each or Rs. 1,000 in all. He admitted, however, at the same time that the wording of section 236 was large enough to bear that construction, but he expressed the opinion that, looking to the result which such a construction entailed, the Legislature could never have intended it. He doubted that a police court could have been invested with unlimited discretion to award to the accused in one case respective sums of Rs. 10. which in the aggregate might be utterly ruinous. He suggested that the true construction of the section was that the magistrate might direct compensation to be paid to an accused not exceeding in all Rs. 10, but he conceded that that would be a strained construction of the section in question. It appears, however, to me that such a construction would lead to a more startling result than that which the late Chief Justice deprecated. The intention of the Legislature was clearly to give monetary compensation to a person who is frivolously charged with an offence for the trouble and expense which he may incur in defending himself against the charge. Can it be reasonably supposed that the Legislature intended that the amount of compensntion to be awarded to the accused was to depend upon the number of persons whom a complainant may have chosen frivolously to accuse in his company? For instance, if a man is frivolously accused of an offence and the complainant has chosen at the same time to accuse 99 other persons is the amount of his compensation to be limited to 10 cents? It seems to me that this would be an absurd result. I find that Mr. Justice DIAS in a case reported in 1. S. C. R. 95 (*Johannes v. Carolis et al.*) expressed the opinion, although he did not decide the point, that section 230 of the Criminal Procedure Code would not bear the construction which the late Chief Justice sought to put upon it. I hold that the section means what it says, and that a magistrate may order a complainant to pay compensation not exceeding Rs. 10 to each accused be their number what it may.

Affirmed.

———:o:———

Present:—LAWRIE and WITHERS, JJ.

(*December* 15 *and* 19, 1893.)

D. C. Kalutara, No. 521 } WIRARATNE v. ENSOHAMI

Crown land—Paddy field—Payment of half crop to the Crown—Acknowledgment of title—Cultivating and Improving Crown land—Right of cultivator to a grant from the Crown—Ordinance No. 12 *of* 1840, *section* 8.

The payment of half the value of the crop of paddy land as grain tax amounts to an acknowledgment of the title of the Crown to the land.

Section 8 of Ordinance No. 12 of 1840 provides "Whenever any person shall have, without any grant "or title from Government, taken possession of and

"cultivated, planted, or otherwise improved any land "belonging to Government, and shall have held un-"interrupted possession thereof for not less than ten "or more than thirty years, such person shall be en-"titled to a grant from Government of such land, on "payment by him or her of half the improved value of "the said land &c.

Held, that the above provision applies only to those who possess and cultivate adversely to the Crown and without any acknowledgment of title in the Crown.

Held by LAWRIE, J., that the right to a grant from the Crown under the above section is personal to the cultivator and possessor himself and does not descend to his heirs, and further that though a grantee from the Crown had in fact not fulfilled the requirements of the above section, still the grant gives him good title to the land as against one who might have been entitled to obtain but did not in fact obtain a grant.

The plaintiff, basing his title to a certain paddy field called Lintottemullewatte upon a grant from the Crown dated 4th August, 1891, sued the defendants in ejectment. The plaint alleged that the plaintiff and his deceased father had cultivated and improved the land since 1850 up to August, 1891, and the Crown grant purported to be issued to the plaintiff under section 8 of Ordinance No. 12 of 1840. The defendants denied the title of the Crown and the plaintiff's cultivation and possession, and they claimed the land by inheritance and prescriptive possession. The evidence disclosed that for many years previous to 1891 one Henderick Vidane, under whom some of the defendants claimed, had cultivated with paddy a portion of the land of about 5 acres in extent, paying to the Crown half the crop as grain tax. The district judge gave judgment for the plaintiff, and the defendants appealed.

Pereira, for the appellants, contended that it having been proved that the defendants had cultivated and improved the land and been in possession for over 10 years, they were entitled to a grant from the Crown under section 8 of the Ordinance No. 12 of 1840, and having this right against the Crown they could not be ejected by the plaintiff, who, though he had in fact obtained a grant, had no right to it.

Wendt, (*Sampayo* with him) for the plaintiff, submitted that the defendants having acknowledged the title of the Crown were not entitled to a grant under the section of the Ordinance relied on, and even if they were, they had no right to the land itself but only to ask the Crown for a grant. Such right could not prevail against the actual title vested in the plaintiff under the Crown grant.

Cur. adv. vult.

On December, 19, 1893, the following judgments were delivered :—

LAWRIE, J.—It is well proved that on 4th August, 1891, Lintottemullewatte was land at the disposal of the Crown.

So far as appears, no person had taken possession of it and had cultivated it without grant or title from Government or had been in undisturbed possession for not less than ten years.

Henderick Vidane had cultivated it for some years paying half of the crop to the Crown, but his possession is not proved to have been such as gave him right to demand a grant from Government on payment of half improved value, and, besides, the right to get a grant is personal to the possessor and cultivator: it does not descend to his heirs. Hendrick Vidane is dead and the third defendant is not even Henderick Vidane's heirs. He is described as his adopted son, but in the Maritime Provinces adoption is not recognised. On the other hand, the plaintiff's cultivation and possession was not uninterrupted for ten years, and it did not fulfil the other requirements of section 8 of of the Ordinance No. 12 of 1840. He was not *entitled* to a grant from Government. Still the Governor "of his own certain knowledge and mere motion" granted and assigned the land to him, and though it is possible that the Governor was satisfied with representations which were not correct, that is a matter with which the defendants have nothing to do, and they had no legal rights which were invaded or injured by this grant which, flowing from the Crown, which had right to make it, must be supported.

WITHERS, J.—The contest in this action is about a piece of land nearly eight acres in extent known as Lintottemullewatte. The plaintiff relies on a Crown grant which he applied for and obtained under section 8 of Ordinance No. 12 of 1840 in August 1891. According to his plaint he and his father before him have held the land continuously from 1850 to 1891, having improved and cultivated it.

If he made similar representations to the Crown in August, 1891, and his word was accepted without enquiry, it is no wonder that he procured the grant which he is using as a lever to expell the defendants. On his own admissions, those representations were, to say the least, inaccurate. He allows that third defendant's adoptive father, the late Henderick Vidane, cultivated five bushels of this land in the years 1880 to 1887, and that the said Hendrick Vidane and the fourth defendant and the first defendant's husband have cultivated five bushels of this land—which he identifies as five of the six bushels he had registered as his own in 1887—at irregular intervals since 1875. No doubt since 1887 the plaintiff has been paying grain tax for the six bushels he had registered, but I question if he has cultivated any of the land, and if he has, I do not think the defendants have taken his crop or any which they did not grow themselves.

Still, what defence have the defendants? They have acknowledged the right in the Crown from

whom the plaintiff now derives title. They have acknowledged it up to 1887. They have not had adverse possession. Mr. Pereira laid great stress on section 8 of Ordinance No. 12 of 1840, but I do not see how these provisions aid his clients. As I understand them, they apply only to those who have used the land as their own without any acknowledgment of title in the Crown and have enjoyed a tenure of over ten and under thirty years, which, if extending to a quarter of a century, would divest the Crown of all title in the land and invest it in themselves.

The judgment of the court below declaring the land to be the plaintiff's must I think be affirmed, but I would give no damages, for in my opinion none have been proved.

Affirmed.

———: o :———

Present:— BONSER, C. J., and WITHERS, J.

(*February* 2, 1894.)

D. C. Kegalle, No. 352/L.8 } FERNANDO v. THE CEYLON TEA PLANTATIONS CO.

Pleading—Claim in reconvention—Replication—Non-denial of allegations in the answer—Practice—Civil Procedure Code.

Under the Civil Procedure Code, where a defendant makes a claim in reconvention, the non-denial of the allegations in the answer by a replication does not entitle the defendant to judgment on the counter-claim without evidence, but the court should take such allegations as denied and should try the issue between the parties as regards the counter-claim.

The plaintiff averred title to a certain land and sued the first defendant company and the second defendant in ejectment. Both defendants filed answer denying the plaintiff's title and the ouster, and the first defendant company further pleaded in their answer in the alternative that they had been in *bona fide* possession of the land and had improved it by planting tea thereon and that the value of such improvements was Rs. 640, and they prayed in reconvention that, in the event of the court holding the plaintiff to be entitled to the land, they be decreed entitled to retain the land until they should have been paid by the plaintiff the sum of Rs. 640.

There was no replication filed by the plaintiff. At the trial the district judge considered that in the absence of a replication the allegations in the first defendant company's answer as regards the claim in reconvention must be taken as admitted and that the first defendant company was therefore entitled to judgment on the counter-claim. He also recorded in his judgment that the first defendant company "was willing that judgment for the land should be entered for the plaintiff on his payment of this claim." A decree was thereupon entered for the first defendant company.

The plaintiff appealed.

Dornhorst (*Sampayo* with him) for the appellant.

Dumbleton, C. C., for the first defendant company.

After argument the following judgment was delivered:—

BONSER, C. J.—This is an appeal on a point of practice. The plaintiff sues the defendant company in ejectment. The defendant company puts in a defence, denying the plaintiff's title and at the same time stating that it has made certain improvements on the land, and then claims in reconvention, that, if the court decides against it on the question of title, it ought to have judgment for the value of the improvements. The plaintiff for some reason or other did not file a replication denying the allegations in the claim in reconvention. When the case came on for trial, the learned district judge gave judgment for the defendant company for the amount of the counter-claim without hearing any evidence, on the ground that the averments in the counter-claim not having been denied on the pleadings must be taken to have been admitted. Now, no doubt this decision was in accordance with the practice of the English courts, but that practice is based upon a rule which expressly provides that allegations of fact not denied specifically or by necessary implication will be taken to be admitted. But in our Civil Procedure Code there is no such provision, and in the absence of any such provision I do not see how the non-denial of an allegation in a pleading can be taken to be an admission of it. It follows that the district judge's decision in favour of the defendant company has no foundation to support it, and that being so, I think that the judgment and decree must be set aside.

I may point out that the decree and judgment are defective, in that they contain no adjudication on the plaintiff's claim to the land, but only a declaration that the defendant company is entitled to hold it until the plaintiff has paid Rs. 640, the amount of the counter-claim. The case must go back to the district judge to be re-tried.

There was a point raised by the plaintiff's counsel to-day, which I will deal with. It appears that at the trial the counsel for the defendant company said that he would consent to judgment being entered for the plaintiff for the land, if judgment were entered for his client on the counter-claim. It is said that that must be taken as an admission of the plaintiff's

title, but I do not agree with this contention. The case must be tried *de novo*, without regard to anything that was said at the former trial.

The costs of the appeal will follow the event of the counter-claim.

WITHERS, J., concurred.

Set aside.

—:o:—

Present:—WITHERS, J.

(*February* 5, 1894.)

D. C. Chilaw, Criminal, No. 2,443. } THE QUEEN v. ROMEL APPU.

Criminal procedure—Plea of previous conviction—Charge in more aggravated form on same facts—Voluntarily causing hurt—Voluntarily causing grievous hurt—Criminal Procedure Code, section 399.

Where a person has been tried for and convicted of an offence, he cannot again be charged on the same facts in a more aggravated form.

Where an accused, who had been convicted of the offence of voluntarily causing hurt under section 314 of the Penal Code, was again charged with and tried for voluntarily causing hurt to the same person and at the same time and place by means of a cutting instrument under section 315—

Held, that the previous conviction was a bar to the trial on the second charge.

The facts of the case are sufficiently disclosed in the judgment of the Supreme Court.

The defendant appealed from a conviction under section 315 of the Ceylon Penal Code.

There was no appearance for the appellant.

Ramanathan, S. G., for Crown.

After argument the following judgment was delivered :—

WITHERS, J.—The question for decision in this case is whether the plea of a former conviction taken in the district court of Chilaw can be sustained. The circumstances of the case I find to be as follows. According to the record of the Police Court of Chilaw No. 5,186, which accompanies the record of the district court proceedings, the present appellant Romel Appu on the complaint of one Saverial Kurera Annavi was charged with causing voluntary hurt to one Barbara Pieris at Mudukatuwa on April 11, 1893, tried by the police magistrate, and convicted of that offence. The trial and conviction took place in the police court of Chilaw on June 23, 1893. On that day the accused Romel Appu was further charged by the police magistrate with causing voluntary hurt to the said Barbara Pieris at the same time and place by means of a cutting instrument, but the accused declined to give consent to be tried on the charge which was beyond the magistrate's jurisdiction. The magistrate in consequence committed him for trial for that offence in breach of section 315 of the Ceylon Penal Code. Instead, however, of withdrawing the accused from the proceedings before him, the magistrate called upon him to answer the charge of the minor offence referred to and convicted of and sentenced him to a term of imprisonment for that offence. Naturally, when this accused was indicated in the present proceedings for an offence against Barbara Pieris under section 315 of the Code committed at the same time and place as the offence of voluntarily causing hurt, he pleaded the former conviction. His plea, however, was not sustained, but no reasons for rejecting it was recorded by the learned judge. The plea, however, should have been sustained. The evidence was precisely the same in both cases, and the act of the accused one and the same as deposed to in the police court and district court. If he voluntarily hurt the person of Barbara Pieris, it was by a single prick on the arm with a lance. The principle of the English criminal law is recognised by our Code, that no one should be charged on the same facts in a more exaggerated form. a principle which has been illustrated by section 399 (e) of the Criminal Procedure Code in these words : "A is charged with and convicted of voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts unless the case comes within paragraph 3 of this section," and the present case does not come within that paragraph. Conviction set aside and accused acquitted and discharged.

Set aside.

—:o:—

Present:—LAWRIE, A. C. J., and WITHERS, J

(*April* 25 *and* 28, 1893.)

D. C. Colombo, No. C. 2,704. } LETCHIMAN CHETTY v. ARUNASALEM CHETTY.

Promissory note—Indorsement—Payee suing—Averments in plaint—Pleading,

In an action by the payee of a promissory note against the maker, the note containing endorsements but no averments being made in the plaint relative thereto—

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Held, that it was not incumbent on the plaintiff to aver and prove such endorsements and that the plaintiff being the actual holder of the note would be presumed to be the holder in due course.

The plaintiff, as the payee of a promissory note payable at the New Oriental Bank, sued the defendant, the maker, for the amount. The note bore the endorsements of the plaintiff and one Kavanna Ravanna Mana Palaniappa Chetty who had specially endorsed it to the Bank. The plaintiff only averred in the plaint the making of the promissory note in his favour by the defendant and the due presentment of the note at the Bank, but did not allege the endorsements or state how he became holder of the note after he had endorsed it. The defendant in his answer pleaded (among other things) as a matter of law, that the note being endorsed and negotiated by the plaintiff he was not the holder thereof and therefore that the action was not maintainable. The learned district judge decided against the defendant on this plea, and also finding for the plaintiff on the facts he entered judgment for the plaintiff accordingly.

The defendant appealed.

Dornhorst (*Sampayo* with him) for the appellant. It is submitted that the judgment is wrong on the point of law raised. The note shows that it had been endorsed away by the plaintiff, and in the absence of averments showing how he subsequently became holder of it, he was not entitled to sue thereon. The case *D. C. Colombo*, No. 88,918, 6 S. C. C. 87, upon which the district judge relies, does not apply, because all that it decides is that when a payee retires a note, it need not be re-endorsed to him in order to enable him to sue the maker. But this is a question of pleading, and it is submitted that, so long as the endorsements remain without being struck out, the plaint should allege at least that the plaintiff paid the note and that it was delivered back to him. It is therefore submitted that the plaintiff is not shown to be the holder of the note in due course, and his action fails.

Wendt (*Morgan* with him) for the plaintiff. The appellant's objection is untenable. The plaintiff is the payee of the note and now actually holds it, and it is submitted that as against the defendant, who is the maker of the note, the action is maintainable without any averment of the subsequent negotiation and retirement of the note. The fact that plaintiff's name appears on the back of the note does not prove that he negotiated it by delivery, or ever parted with the possession of it. The decision referred to is in point, and is not restricted to the single point mentioned but shows that an action such as the present can properly be brought. The plaintiff being in possession of the note must be presumed to be the holder in due course (Bills of Exchange Act, 1882, section 30 (2)), and is entitled to sue in the present form.

Cur. adv. vult.

On April 28, 1893, the following judgments were delivered:—

WITHERS, J.—The point taken by Mr. Dornhorst that the plaintiff was, under the circumstances of this case, bound to aver or at least prove facts constituting him the holder in due course of the note sued on is, I think, untenable.

The plaintiff is the payee of the note and is the actual holder of it. Now, by section 30 of the Bills of Exchange Act, every holder of a bill (and this applies to a note as well) is *prima facie* deemed to be a holder in due course, and this Court has held that a bank, where a dishonored note has been retired, is not bound to endorse and deliver it to a party on the note who has retired it.

As to the question of fact, whether the defendant signed the note in blank to Sadayappa Chetty under the condition that it was to be filled in for a particular sum, and that his (Sadayappa's) name alone was to be filled in as payee, the learned judge at the conclusion of his judgment has found that the defendant had not sustained the onus which lay upon him to prove that restrictive authority. I see no reason to differ from that finding. I am for affirming the judgment with costs.

LAWRIE, A. C. J.—I agree.

Affirmed.

———:o:———

Present:—BONSER, C. J., and LAWRIE, J.

(*February* 1 *and* 9, 1894.)

D. C. Colombo, No. 1,686. No. 1,687. No. 1,759. } THE CHARTERED MERCANTILE BANK OF INDIA LONDON AND CHINA. v. SADAYAPPA CHETTY.

Stamps—Promissory note - "Insufficiently stamped"—"Duly stamped"—Cancellation of stamp—Construction—Ordinance No. 23 *of* 1871 *sections* 4, 9, 34, 39—*Ordinance No.* 3 *of* 1890, *section* 3.

Under the provisions of the Stamp Ordinance, 1871, a promissory note, which is not "duly stamped" by reason of the stamp being uncancelled though of the proper value, may be received in evidence at the trial, under section 39, upon payment of the prescribed penalty; the procedure laid down in that section not being limited to instruments bearing either no stamp at all or a stamp of deficient value.

In these actions the plaintiff bank as payees sued the defendants as the makers of several promissory notes dated in the year 1888. The libel also claimed the amount of the debt upon the common money counts. The defendant, Sadayappa Chetty, who alone entered an appearance, denied the making of the promissory notes and pleaded never indebted to the money counts. At the trial, on December 12, 1892, when the notes were tendered in evidence, it was objected, on behalf of the defendant, Sadayappa Chetty, that they were inadmissible in evidence, on the ground that they were not duly stamped. The notes all bore the proper amount of stamp duty, and the stamps were cancelled with the makers' initials, but did not bear the date of cancellation. The dates of the notes were different from the stamp-vendor's dates appearing on the respective stamps. The plaintiff bank moved for leave to have the notes stamped by the Commissioner of Stamps, and paid into court the penalty of Rs. 105 in respect of each of the notes.

The learned district judge (*Morgan*) in holding that the notes were inadmissible in evidence said :— "The 39th section of the Ordinance (No. 23 of 1871) is as follows :—'Upon the production, as evidence, at the trial of any cause, of any instrument liable to stamp duty, which is unstamped or not duly stamped, the officer of the court ...shall call the attention of the judge to any omission or insufficiency of the stamp...... ; and the instrument, if unstamped or not duly stamped, shall not be received in evidence until ..... the whole or the deficiency of the stamp duty, and the penalty required by this Ordinance, together with the additional penalty of Rs. 5, shall have been paid into court;' and by section 40 'upon payment into court of the whole or of the deficiency of the stamp duty... and of the penalty required by this Ordinance, and of the additional penalty......thereupon such instrument shall be admissible in evidence.' The words in section 39 'unstamped or not duly stamped' appear to me to be defined by what follows in that section, and mean that when an instrument liable to stamp duty has no stamp on it at all, or has a stamp on it but less than the proper amount of duty required by the Ordinance, it may be rendered admissible in evidence under that section. The words 'omission or insufficiency of the stamp,' and the payment of 'the whole or the deficiency of the stamp duty' appear to my mind to refer to and explain or define the words 'unstamped or not duly stamped.' Provision is therefore made under those two sections for stamping instruments at the trial, when such instruments bear no stamp at all, or bear a stamp of insufficient value; but no provision is therein made for an instrument which has on the face of it the proper amount of duty required by the Ordinance, but has not been cancelled by the person who should have cancelled the same by putting across the stamp the true date of his so writing or marking his name or initials. * * * * But assuming that the promissory notes can be rendered admissible in evidence under sections 39 and 40 of the Ordinance, it can only be done 'if the instrument is one which may legally be stamped after the execution thereof.' These words, I am of opinion, contemplate instruments which may in virtue of sections 23 and 36 be legally stamped by the Commissioner under certain circumstances and within certain times. In regard to the promissory notes in question the time mentioned in those sections has long elapsed and they cannot be stamped after execution under the terms and conditions mentioned in those sections." The learned district judge also held that the plaintiffs could not proceed on the money counts, and dismissed their action with costs.

The plaintiffs appealed.

Dornhorst (*Wendt* and *de Saram* with him) for the appellants. The learned district judge, it is submitted, has misconstrued the words of the Ordinance No. 23 of 1871. The words "unstamped or not duly stamped" in section 39 cover the case where the instrument bears no stamp at all or one of lower value than necessary or where the instrument bears the proper amount of stamp but the stamp has not not been duly cancelled. Section 9 defines what is meant by "duly stamped," showing that the stamp must be cancelled. Cancellation consists in writing or marking on the stamp the name or initials of the maker together with the true date of his so writing or marking. Here the notes bear the initials of the maker but not the date of his so writing and is therefore "not duly stamped." In *Durham Grindrod's Case*, (*D. C. Colombo, No.* 65,822, Ram. (1875) 216.) it was held that a note similar to the present could be re-stamped. The case is imperfectly reported, but on reference to the original record it will be seen that that case is on all fours with the present. There, the promissory note put in suit bore the proper amount of stamp duty but the stamp was not properly cancelled. The Supreme Court permitted the plaintiffs to have the note duly stamped on payment of the required penalties. This case was expressly followed in *D. C. Galle, No.* 10,612, Ram. (1877) 202, and the same principle was recognised by Withers, J., in *D. C. Kandy No.* 5,183, 1 S. C. R. 311. (See also *D. C. Colombo, No.* 62,495, Wendt 352.) Again, supposing the notes to be inadmissible in evidence under sections 39 and 40, it is submitted that they can be put in under section 24, subsection 3. Subsections

1 and 2 of section 24 refer to bills of exchange, drafts, cheques, or orders, or promissory notes, and penalties are therein imposed for not affixing the proper stamps or not cancelling the same. And in the latter part of subsection 3 " any person who shall take or receive * * any foreign or inland bill of exchange, draft, cheque * * or order * * without the same being duly stamped and cancelled as aforesaid, shall not be entitled to recover thereon or to make the same available for any purpose whatsoever." In the new Stamp Ordinance (No. 3 of 1890) the words " or promissory note" are omitted and this omission it is submitted was intentional, and the promissory notes could now be put in evidence on payment of the required penalties. [Bonser, C.J., referred to *Vernon Allen* v. *Meera Pullay*, L. R. 7 App. Cas. 172.] That case is exactly in point. It is submitted that the present judgment is wrong and ought to be set aside.

Grenier (*Morgan* with him) for the defendant. The Ordinance No. 23 of 1871 deals with two classes of cases only; firstly, where the promissory note does not bear a stamp at all, and, secondly, where it has been insufficiently stamped. In both cases the Ordinance provides a remedy. The words in sections 39 and 40 of the Ordinance must be strictly construed. The words " duly stamped" are defined in section 9: the instrument must bear the proper amount of stamp duty and the stamp must be cancelled by writing or marking in ink on or across the stamp the name or initials of the maker of the note together with the true date of his so writing or marking. Here the instruments bear the proper amount of stamp duty, and the stamps are initialled with the makers' initials, but the stamps are not cancelled within the meaning of the Ordinance by the maker writing across them the true date of the cancellation; therefore the instruments are not duly stamped according to the meaning of section 9. Section 39 provides for instruments which are unstamped or not duly stamped. Section 40, it is submitted, deals with only the former, for it enacts that upon payment into court of the *whole* or of the *deficiency* of the stamp duty and of the required penalty the instrument is to be received in evidence. This section does not deal with the case where an instrument is not duly stamped by reason of the stamp being uncancelled though of the proper value. The Ordinance is silent on that point, and it is submitted that such notes cannot therefore be re-stamped.

Dornhorst, in reply.

Cur. adv. vult.

On February 9, 1894, the judgment of the Court (Bonser, C.J., and Lawrie, J.) was delivered by

Lawrie, J.—At the trial of these actions it was objected that the promissory notes sued on and tendered in evidence were not duly stamped inasmuch as the maker had not cancelled the stamps in the manner required by section 9 of the Ordinance No. 23 of 1871 which was the Ordinance governing the stamping of promissory notes at the time the notes were made. The learned district judge sustained the objection and the plaintiff company paid into court Rs. 105 for each note as the penalty required by the Ordinance and moved that the promissory notes be received in evidence. This the district judge refused to do, holding that, although a promissory note bearing no stamp at all or bearing a stamp of insufficient value might be admitted as evidence, if at the trial the deficiency of stamp and the penalties were paid into court, promissory notes bearing sufficient stamps but which had not been duly cancelled were in a different position, and that such instruments could not be received in evidence even on payment of penalties.

The first question which arises for decision is, which is the Ordinance applicable to the present case; for, since the making of the note and before action brought, the Ordinance No. 23 of 1871 was repealed by Ordinance No. 3 of 1890, the Ordinance now in force. We are of opinion that the Ordinance of 1871 is the Ordinance which must govern the case, inasmuch as the Ordinance of 1890 contains a proviso (in section 3 which repeals Ordinance No. 23 of 1871) keeping alive all rights privileges etc. acquired or accrued under the repealed Ordinance, and also providing that any legal proceeding or remedy in respect of any such right or privilege might be carried on as if the repealing Ordinance had not been passed.

Under the Ordinance No. 23 of 1871 the holder of a promissory note not duly stamped had an absolute right to require the court to admit it as evidence on payment of the penalty and that right is saved in the Ordinance No. 3 of 1890.

We are of opinion that the learned district judge's construction of the Ordinance No. 23 of 1871 is opposed to the plain meaning of the words and to previous decisions of this Court.

Section 34 of the Ordinance permits the admission at a trial of instruments not duly stamped, and section 4 defines when an instrument is not duly stamped, and this promissory note falls within that definition. The subsequent words in section 39 " any omission " or insufficiency of the stamp" do not in our opinion restrict the remedy only to cases where the value of the stamp is too small. Insufficiency need not mean

only insufficiency in value; it includes the case of a stamp which is insufficiently cancelled, when, as here, the maker did not do all that the Ordinance requires. This reading of section 39 was sustained by the Full Court in July, 1875, (Morgan, A. C. J., Stewart and Cayley JJ.) in *D. C. Colombo* No. 65,822, *Durham Grindrod and Company* v. *Meera Lebbe*. There is a meagre report in Ram. (1872-76) 216, the head note of which is incorrect.

We have before us the original record and from that we find that in that case the promissory note bore a stamp of sufficient value but that it had been insufficiently cancelled. This Court remitted the case to the district court with instructions to admit the note in evidence on payment of the required penalties. We follow that decision which is binding on us.

The Privy Council put the same construction on the very similar words of the Strait Settlements Stamp Ordinance in *Vernon Allen* v. *Meera Pullay*, January 24, 1882. (7 App. Cas. 172, 51 L. J. P. C. 50).

We are therefore of opinion that the promissory note ought to have been admitted in evidence, the required penalty having been paid into court, and we set aside the judgment dismissing the action and remit to the district court to proceed according to law. The plaintiff company are entitled to the costs of the discussion of this point in the district court and of this appeal.

Set aside.

———:o:———

Present:—Withers, J.

(*February* 15, 1894.)

M. C. Colombo, No. 115. } VanHouten v. Gauder.

Liquor—Selling liquor during prohibited hours—Ordinance No. 12 *of* 1891, *section* 39, *subsection* 2—*Evidence.*

Ordinance No. 12 of 1891, section 39, subsection 2, makes it an offence for the keeper of an hotel or refreshment room to sell therein any intoxicating liquor to any person after the hour of midnight and before the hour of five in the morning.

Held, that under the above enactment it is not enough to prove that persons were seen consuming intoxicating liquor at an hotel during the prohibited hours, but it is incumbent on the prosecution also to prove that the liquor was delivered during such hours and that it was so delivered by the accused or by his order.

The defendant was the keeper of an hotel to which a license had been granted under the above Ordinance. He was charged under subsection 2 of section 39 of the Ordinance with having sold intoxicating liquor to persons at the hotel after the hour of midnight and before five in the morning on Christmas Eve, 1893.

The facts are set out in the judgment of the Supreme Court.

The defendant appealed from a conviction under the above charge.

Dornhorst, for the appellant.

Ramanathan, S.-G., for the Crown.

After argument the following judgment was delivered :—

Withers, J.—This judgment is, in my opinion, against the weight of evidence, and must be set aside. The accused is the keeper of a hotel and as such was charged with selling intoxicating liquor to persons at that hotel after the hour of midnight and before 5 a.m. on Christmas eve.

It is incumbent on the prosecution to prove that within these hours intoxicating liquor was *delivered* by the accused to persons in the hotel, delivery being by the Ordinance a rebuttable presumption of sale.

The first witness, Inspector Trevena, visited this hotel on that night between 1-30 and 2 a.m., and what did he see there? Only soldiers in the hotel and people standing at the bar. He saw beer in tumblers on the counters, but he did not see any beer or intoxicating liquor delivered to any one there either by the accused or by a servant of the accused in his presence. Moreover, he did not see the accused there at all.

The next witness, Miskin, does not help the prosecution. He appears to have gone to the hotel about the same time as the Inspector. He did not go inside the hotel. He did not see the accused on the premises, and all that he did see was people drinking from tumblers. He does not say what they were drinking.

The other witnesses, Sergeant Illes and Private Stokes, visited the hotel between 2 and 3 a.m. They saw men sitting down by the bar drinking beer; and the Sergeant says he saw the accused go inside the hotel at the time he visited it, and he had some conversation with him.

Now, as to *when* this beer which the men were seen drinking was delivered to them, there is no evidence at all. It may have been delivered to them before 12 o'clock. It is, perhaps, more likely that it was delivered to them after 12 o'clock. But, even if this were so, that is not enough to convict the accused, for there is no sort of evidence that the beer was delivered by him or by his order.

Set aside.

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Present :—BONSER, C. J., and WITHERS, J.

(*January* 24 *and February* 1, 1894.)

D. C. Colombo, Criminal, No. 832. } The QUEEN v. HABIBU MAHAMADU.

Criminal Law—False evidence—Materiality—Intention—Ceylon Penal Code, sections 188, 190.

Under the Ceylon Penal Code the materiality of the statement of a witness in the course of a judicial proceeding is not an essential part of the offence of intentionally giving false evidence, but may only be relevant to the question whether the witness had the intention to swear falsely.

The defendant was indicted under section 190 of the Penal Code for having intentionally given false evidence in the course of a judicial proceeding, in that he being a witness in the action No. 2,873 C of the District Court of Colombo falsely denied in his evidence that he had signed a power of attorney produced in the case. The learned District Judge, while holding that the statement was false, acquitted the defendant on the ground that the materiality of the evidence to the case had not been established. The Attorney-General appealed.

The case came on for argument before WITHERS, J., on January 24, 1894.

Dornhorst (*Sampayo* with him) for the appellant.

VanLangenberg(*Bawa* with him) for the defendant.

Cur. adv. vult.

On February 1, 1894, at the direction of WITHERS, J., the appeal was re-argued before himself and BONSER, C. J., when the same counsel appeared, and after argument the following judgments were delivered :—

BONSER, C. J.—In this case we have to decide a mere dry point of law, and that is this—whether the materiality of a statement is an essential part of the offence of intentionally giving false evidence in a stage of a judicial proceeding under section 190 of the Penal Code. The definition of false evidence is contained in section 188 of the Code, and materiality is not there mentioned. The definition is—"Whoever, being legally bound by an oath or affirmation or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence." It does not say any material statement or any statement material to the issue being tried, but any statement. In subsequent sections, however—section 189, 194, 195, 196, and 197—which deal with fabricating false evidence, materiality is expressly made a part of the offence, and it seems, impossible to avoid the conclusion that the Legislature, in defining the offence of giving false evidence, intentionally left out the element of materiality. That view has been held, I believe, by all the Indian Courts with respect to the identical provision in the Indian Penal Code, and it is settled law in India that the corresponding section of the Penal Code does not require materiality as the essence of the offence of giving false evidence in a judicial proceeding. The learned District Judge has, however, in the case now before us, held that, although that may be the true construction of the Code taken by itself, yet when read in connection with the provisions of Section 2 of Ordinance No. 3 of 1846 a different interpretation must be put upon it. Section 2 of Ordinance No. 3 of 1846 is a section which introduces the English law of evidence into the courts of this colony, and in effect says that when no other provision is made by the local law the English law of evidence shall be the law of evidence in the courts of this colony. But I fail to see how this section can have the effect attributed to it by the learned District Judge. It merely deals with procedure, not with the substantive law; whereas the Penal Code deals with the substance of offences, and I cannot understand how a provision which says that you may prove an offence in a particular way can alter the substance of the offence itself. If the Legislature has enacted that materiality is not of the essence of an offence, I do not see how any rule of evidence can operate so as to repeal the intention of the Legislature and render that an essential ingredient in an offence which the Legislature has not expressed to be such.

Of course the materiality of a statement, although not of the essence of an offence, is not unimportant, for it may have a considerable bearing on the intention of the accused. The statements may be so entirely unimportant that a jury may be justified in coming to the conclusion that the attention of the accused was not called to what he was saying and that there was an absence of any intention to wilfully mislead them and to make an untrue statement. From this point of view, materiality is an important though not an essential element in the offence. I am unable to agree with the conclusion arrived at by the learned District Judge, and our order will be that the case be remitted to the District Court for re-adjudication, having regard to our decision as to the nature of the offence.

WITHERS, J.—I think the learned District Judge has taken a wrong view of the law. He seems to

have confounded substantive with adjective law. Materiality has always been a part of the definition of the crime of perjury in English criminal law; it is an element in the offence itself which has to be averred in the charge as well as proved by the evidence. Moreover, section 188 of our Penal Code has blotted out the word "perjury" from the Ceylon Statute Book and put another offence in its place.

Set aside.

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Present:—LAWRIE and WITHERS, JJ.

(December 22, 1893, and January 19, 1894.)

D. C. Kandy, No. 4,205. } KOMERAPPA v. MUTTIAH.

Fiscal's sale—Setting aside sale for irregularity—Party "interested" in the property sold—Writ-holder in another action—Right of concurrence in proceeds sale—Civil Procedure Code, sections 282, 352.

Section 282 of the Civil Procedure Code enacts: "the decree-holder, or any person whose immoveable property has been sold under this chapter, or any person, establishing to the satisfaction of the court an interest in such property, may apply by petition to the court to set aside the sale on the ground of a material irregularity in publishing or conducting it."

Held that a decree-holder in another action, who has obtained a judgment against the same debtor and who is entitled to share rateably in the proceeds of sale of the debtor's property under section 352 of the Code, is a person having an "interest" in such property within the meaning of section 282, and may apply thereunder to have the sale in execution set aside.

The plaintiff in this action having obtained a decree for money against the defendant issued writ and had certain immoveable property of the defendant sold under the writ on March 4, 1893. Then one Palaniandy, who had in the action No. 3,998 of the District Court of Kandy obtained a money-decree against the same defendant and had issued writ prior to the sale of the said property and still held an unsatisfied decree, applied by petition in this case to have the sale of the said property set aside under section 282 of the Civil Procedure Code. The learned District Judge disallowed the application on the ground that the petitioner Palaniandy had no "interest" in the property sold as contemplated by section 282 of the Code. Palaniandy appealed.

Bawa for the appellant.

Dornhorst for the plaintiff.

Cur. adv. vult.

On January 19, 1894, the following judgment was delivered:—

LAWRIE, J.—The question to be decided is, whether the petitioner is the "decree-holder or any person whose immoveable property has been sold, or a person who has established to the satisfaction of the court an interest in the property"; for, the right to have a sale set aside is limited to these three classes of persons.

Of course the petitioner is not in the second class; he is not the person whose property has been sold. The District Judge finds that the petitioner has not established to his satisfaction that he has an interest in the property, but ought not the District Judge to have been satisfied?

It is true that the petitioner is not a lessee or mortgagee or a life-renter or a planter—these are the illustrations given by the learned District Judge. If he were any of these, he certainly would have had an interest in the property; still it would be an interest unaffected by the sale, and hence no interest which entitled him to have a sale set aside.

I put a different meaning on the word "interest" in this section. I think that every judgment-creditor, who has applied for execution of a decree against the same judgment-debtor and has not obtained satisfaction, has an interest in the property of his debtor sold under another writ. Section 352 of the Civil Procedure Code seems to me to give him a clear interest in it—an interest that the property shall be sold with strict attention to the requirements of the Code, so that the largest price shall be obtained. He has an interest in the proceeds of the sale, and if he has an interest in the price which stands in the place of the land, he has an interest in the land itself.

I am of opinion that all creditors who are in the position of those mentioned in the first part of section 352 have an interest which entitles them to be heard to set aside a sale in execution. I prefer to rest my judgment on this ground rather than on the reading of section 311 of the Indian Code by the Madras High Court in the case reported in I. L. R., 10 Mad. 57. There the Madras High Court held that the word "decree-holder" meant not only the decree-holder on whose writ the sale had taken place but all decree-holders who were entitled to share in the proceeds under section 295 (the same as our section 352). This seems to me rather a strained reading of the Code.

I would set aside and send the case back to the District Court to decide whether the sale should be set aside on the ground of material irregularity.

The petitioner to have the costs of this appeal.

WITHERS, J., agreed.

Set aside.

Present :—LAWRIE and WITHERS, JJ.

(*February* 20 *and* 23, 1894.)

D. C. Colombo, No. C2,754. } ALBRECHT v. GREBE.

Civil Procedure—Execution—Property in the custody of a public officer—Money deposited as security by an employe—Seizure under private creditor's writ—Hypothec—Right of the execution-creditor to compel the money being brought into court—Preferent claim—Practice—Civil Procedure Code, sections 229, 230, 232.

Where money was deposited with a public officer by an employe and was hypothecated by bond as security for the due discharge of the employe's duties—

Held that the money could be seized in the hands of the public officer in execution of a judgment obtained against the employe by a private creditor under the provisions of section 232 of the Civil Procedure Code, and that the public officer was bound to bring the money into court at the instance of the execution-creditor, subject to the right of the public officer to have the question of hypothec of other preferent claim determined by the court.

The plaintiff, on February 20, 1893, obtained judgment against W. A. Grebe, the second defendant in this action, for the sum of Rs. 1,200, and under a writ issued in execution thereof a sum of Rs. 1,000 was seized in the custody of the Postmaster-General, the fiscal purporting to seize the same under the provisions of section 229 of the Civil Procedure Code as a debt due by the Postmaster-General to the second defendant. The plaintiff thereafter, on May 23, 1893, filed a petition making W. A. Grebe, the second defendant and the Postmaster-General respondents thereto, and moved for a summons on them to shew cause why the debt due by the Postmaster-General to the second defendant should not be paid to the plaintiff and in default of such cause being shown the plaintiff prayed that the court do order the said sum seized as aforesaid to be brought into court. It appeared that the second defendant was employed as postmaster under the Postal Department, and the Postmaster-General according to some departmental arrangement was in the habit of retaining a certain percentage of the salary of the employes as security for the due discharge of their duties. The Rs. 1,000 in question were such deductions from time to time made out of the salary of the second defendant and were hypothecated to the Postmaster-General by bond as security aforesaid. The Postmaster-General appeared, and admitted that Rs. 1,000 was held by him under the above circumstances as security for the due discharge of the second defendant's duties as postmaster but disputed the existence of any debt due by him to the second defendant and produced the bond of hypothecation.

The learned District Judge held as follows:—"I regard the provisions of section 229 (a) of the Civil Procedure Code as applicable only where (1) there is a simple liquid money debt due by a third party to the debtor, and (2) where the third party expressly does not dispute the fact, or by his non-appearance on summons tacitly does not do so. Once he disputes the debt to be absolutely due by him, the debtor, or the debtor's assignee (viz., the creditor, if he should obtain assignment of the claim from the debtor or should sell up and buy the debtor's right in execution, or else the assignee of the debtor's insolvent estate after adjudication) must litigate with the third party to enforce its payment in a proper action for its recovery. Section 230 neither authorises nor indicates any summary or incidental procedure to determine the dispute. The second respondent here has disputed the existence of any liquid debt to be absolutely due by him to the debtor, saying that the money in his hand is hypothecated to him for a special purpose. I have no power in this suit to decide whether any valid hypothecation, and to what extent, exists. On what materials to raise issues, and on what stamps, should such litigation be conducted? Apart from this, however, I consider that on such facts as have been placed before me the property in question falls within the operation of section 232, in which view the necessary notice has not been served on the second respondent and the procedure adopted has been irregular." And the District Judge dismissed the petition.

The plaintiff appealed.

Wendt for the appellant.

Ramanathan, S. G., for the Postmaster-General.

Cur. adv. vult.

On February 23, 1894, the following judgments were delivered:—

LAWRIE, J.—I see no reason why the Postmaster-General should not bring into court all the moneys seized in his hands as belonging to the judgment-debtor in this case.

As soon as the fund is in court, the right of the Postmaster-General as representing the Crown to be paid the whole or a part of the money must be considered and adjudicated on. The fund ought not to be paid out of court without due notice to all interested, and if the Postmaster-General proves that the defendant is a Crown debtor, it may be that the debt must be preferred and that the plaintiff may get little or nothing.

I agree to the order proposed by my brother Withers.

Withers, J.—It appears to me that this money (Rs. 1,000) should be paid into court, and I would so order it.

It was clearly property of the execution-debtor in the custody of the Postmaster-General and held in trust for him. It may be subject to a valid charge which shall prevail over plaintiff's claim as execution-creditor, but this is no reason why it should not be paid into court and into the court proper to determine a matter of the kind. The learned Judge dismissed the application because the judgment-creditor had seized this money rather as a debt due to the execution-debtor under section 229 than under section 232 as property deposited in the custody of a public officer. This was a little hard on the petitioner, who had been allowed to take out a summons on the Postmaster-General to show cause why this money should not be paid into court. He should then have been directed to re-seize the property. I so far agree with the learned Judge that that was the more appropriate form of seizure in the circumstances, and had the respondent come forward to have the seizure dissolved he might well have succeeded. But considering that he did not do so and that whether a debt is seized under section 229, or property is seized under section 232, the debtor is required to hold the debt, and the bailee the property, subject to the orders of the court, and that the appellant was allowed, as I said before, to take out a summons on the respondent to show cause why the Rs. 1,000 should not be paid into court, I regard the cause shown as a technical rather than a meritorious one. The appeal therefore succeeds with costs.

Set aside.

———:o:———

Present:—Withers, J.

(*February* 14 *and* 19, 1894.)

C. R. Colombo, No. 93 C. } Hendrick Appu v. Juanis Naide.

Arbitration—Award—Matters not within the reference—Amendment of award—Judgment—Jurisdiction—Civil Procedure Code, sections 687, 688.

Section 687 of the Civil Procedure Code provides that within fifteen days from the date of receipt of notice of the filing of an award any party to the arbitration may apply by petition to set aside, modify, correct, or remit the award on grounds mentioned in the subsequent sections.

Section 688 (*a*) enacts that the court may modify or correct an award where it appears that part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred.

Held that it is competent for the court under Chapter LI. of the Code to modify or correct an award or remit it to the arbitrator of its own motion without any application therefor by any party under section 687.

The plaintiffs claimed title to a certain land from one Pedro Naide and sued the defendant in ejectment. The defendant set up title in himself based upon a purchase at a fiscal's sale in execution of a judgment obtained by him upon a mortgage bond granted by one Singho Naide. Upon the application of parties the matters in dispute in the case were referred to arbitration. The facts as found by the arbitrator were that the land originally belonged to Singho Naide, who by bond dated January 7, 1887, mortgaged it to defendant and subsequently died intestate without issue. After the death of Singho Naide, one Don Juan and one Baba, professing to be heirs of Singho Naide, sold the land to Pedro Naide the vendor to plaintiffs. Subsequent to this the defendant sued Don Juan on the bond as heir of Singho Naide and in execution of a judgment obtained by him had the land sold and purchased it himself. The arbitrator in his award, after setting out the facts as above, proceeded as follows:—"I think the plaintiffs should have judgment for the land subject to the payment of the amount due to the defendant upon his bond dated January 7, 1887. I award that the plaintiffs be declared entitled to the land described in the plaint, and they do pay to the defendant the principal and interest due upon his bond dated January 7, 1887."

The award was filed on February 3, 1893, but no notice thereof appears to have been given to the parties, and on July 18, 1893, the court ordered the action to abate, no steps having been taken therein for 6 months. On August 14, 1893, a motion made by plaintiff to modify the award was refused, as the action had by the previous order of court abated. On September 28, 1893, the order of abatement was set aside on the application of plaintiffs and notice was issued to the parties of the award having been filed. The notice was served on October 18, 1893. On October 24, 1893, the plaintiffs moved

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that a part of the award be struck out. Notice having been issued of this motion, the matter was discussed on November 6, and the Commissioner ultimately entered judgment for the plaintiffs for the land; but as to that part of the award which ordered the plaintiffs to pay defendant the amount of the bond, the Commissioner declined to enter judgment thereon, as it was a matter beyond the reference to the arbitrator. The defendant appealed.

Sampayo for the appellant. The Court had no power to modify the award under the circumstances of this case, for under section 687 of the Code it can only do so on application by petition by one of the parties. Here there was no such petition of application. Further, granting that it is competent for the Court to modify an award of its own accord, the part of the award not within the reference should be separable from the other part (section 688); but here award of the land to the plaintiffs was clearly conditional on their paying to the defendant the amount of the bond. It is therefore submitted that the judgment entered upon one part of the award only is bad.

Wendt for the plaintiffs. It is submitted that section 688, giving power to the Court to modify or correct an award, does not depend on the preceding section 687 so as to require an application by a party for the exercise of that power. The Court can act under section 688 independently of any application when any of the grounds stated therein appears. Here the only dispute between the parties was as to the title to the land, the action being purely one in ejectment; and there was a distinct finding of the arbitrator for the plaintiffs in respect of the land. This part of the award is easily separable from the needless order as to payment of the bond, and the judgment appealed against is therefore right.

Cur. adv. vult.

On February 19, 1894, the following judgment was delivered:—

WITHERS, J.—I think upon the whole that it is right and proper that I should affirm the Commissioner's decree. It was open to appeal, because it did not conform to the award; but the award was wrong in so far as it ordered the plaintiffs to pay to the defendant the principal and interest due upon his bond dated 7th January, 1887. The question of any liability on plaintiffs' part to satisfy this mortgage debt was not within the order of reference, and this excess must be pruned away. Besides, the order was indefinite, as it did not ascertain the amount to be paid by way of principal and interest.

I thought at first that I ought to remit the award to the arbitrator for reconsideration on this point, and for ascertaining and determining the amount to be paid by the plaintiffs. But this would only delay the matter, and perhaps involve the parties in further expense.

In my opinion the Court was competent under section 688 of the Civil Procedure Code to modify and correct this award in a point easily separable from the rest of the award when the arbitrator had plainly exceeded his powers. What puzzled me and made me desire further argument was section 687 of our Code. The chapter relating to arbitrators is taken almost *verbatim* from the Indian Code, with the exception of this section, which is quite new. It seemed to me capable of argument that the Court could only interfere in an award under this chapter on the application of one of the parties by reason of this section. But, after hearing counsel and considering the matter, I am of opinion that the Court may modify and correct an award, or remit it in the way and for the purposes indicated in the Code, when, and howsoever, those purposes are brought to the notice of the Court. Its order would of course have to be made, as it was here, *inter partes*.

Affirmed with costs

Affirmed.

———:o:———

Present:—LAWRIE and WITHERS, JJ.

(*February* 23 *and* 27, 1894.)

D.C., Colombo, No. C1,417. } CASSIM LEBBE MARIKAR *v.* SARAYE LEBBE.

Civil Procedure—Assignment of money decree—Substitution of assignee in the room of the decree-holder—Affirmance of the decree in appeal—Appeal to the Privy Council—Practice—Civil Procedure Code, section 339.

An appeal *ipso facto* suspends a decree, and nothing can be done thereon unless otherwise provided by law; but steps taken to bring a decree of the Supreme Court in review in order to an appeal to Her Majesty in Council, and even the judgment of the Collective Court in review, do not constitute an actual appeal so as to stop the execution of the decree.

Where a decree of the District Court was affirmed in appeal by the Supreme Court, and steps having been taken by the appealing party to have the judgment of the Supreme Court brought up in review preparatory to an appeal to the Privy Council, a certificate was issued in pursuance of section 781 of the Code, and a day was fixed for the hearing of the case in review; and where thereafter an assignee of the decree was upon his application allowed by the District Court to have his name substituted for that of the decree-holder in the record of the decree and to issue execution;—

Held, that the District Court was the Court competent to execute the decree, as the judgment of the Supreme Court in appeal became the judgment of the District Court; that it was within the discretion of the District Court to execute the decree for the benefit of the assignee; but that in view of the intended appeal to Her Majesty in Council, the proper form of order should have been, not to

substitute the name of the assignee in the record of the decree, but to allow execution in the name of the assignor, due entry being made in the record as to the assignee who was allowed to take out execu tion in his assignor's name.

The plaintiff appealed from an order allowing an application of the respondent, Uduma Lebbe Marikar Mohammadu, as assignee of a decree for costs in favour of the 2nd defendant, Saffa Umma, to have his name substituted for that of the 2nd defendant in the record of the decree, and to take out execution. The facts of the case sufficiently appear in the judgment of Withers, J.

Wendt (*Sampayo* with him) for the appellant.

Dornhorst for the applicant respondent.

Cur. adv. vult.

On February 27, 1894, the following judgments were delivered :—

WITHERS, J.—In this action the 2nd defendant was successful in resisting the plaintiff's claim ; so that on September 19, 1892, it was decreed as regards her that the plaintiff's action be dismissed with costs. The decree of dismissal was appealed from, with the result that this Court affirmed the decree with costs on February 28, 1893. Thereafter in June last year an application was made by one Uduma Lebbe Marikar Mohammadu, as the assignee of the successful decree-holder, Saffa Umma (the 2nd defendant before referred to), for leave to execute that decree, and for that purpose to have his name substituted for his transferor in the record of that decree. An *order nisi* was allowed to go out on the application ; and on July 3 following, after hearing counsel for the parties to the action, the learned Judge allowed the application. This order is now before us in appeal, and was criticised on several grounds. The first was, that, assuming that there was a valid assignment of the decree, it was an assignment of the decree of this Court, and application should have been made to this Court for the purposes of execution. I do not think this contention sound. The petitioner applied to the only Court competent to execute the decree in question. To use the language of Mellish, L. J., in the case of *Justice* v. *The Mersey Steel & Iron Company*, *L. R.* 1 *C. P. D.* 575, "this Court, having given its judgment on the appeal, has ceased to have seisin of the case; our judgment becomes the judgment of the High Court (here the District Court), and the matter is remitted to that Court". Another ground taken was the imperfection of the assignment. It was urged that the assignment did not operate to pass the decree to the petitioner. But I am against counsel on this point. The operative part of this writing assigns both the judgment of the the District Court and that of the Supreme Court affirming it, and all the benefit of either judgment. The judgment clearly means decree; and to put in the judgment of the District Court was perhaps superfluous.

Another point taken was, that, prior to this application by the assignee of the decree, a petition had been addressed to this Court to have the (assigned) decree brought before the Supreme Court collectively by way of review, the plaintiff being apparently desirous of appealing from that decree to Her Majesty in Council. That application was made within two months from the date of the assigned decree ; and in due course the plaintiff, as such intending appellant, obtained an order for a certificate in pursuance of the provisions of section 781 of the Civil Procedure Code. Further, a day was fixed for hearing the case in review before the Collective Court ; but that has been the last step in the direction of the review. During the discussion I thought this a strong point, because it seemed to me that all the proceedings in the action were suspended in consequence of the plaintiff having taken active steps to bring the decree in review. An appeal, *ipso facto*, suspends a judgment, so that nothing can be done upon it unless otherwise provided by law. But I do not consider that steps taken to bring a decree in review in order to an appeal to Her Majesty in Council constitutes an actual appeal ; and if they do not amount to appeal, there is nothing to stop the execution of the decree of the Collective Court, the decree, that is, of review. There being nothing, then, to arrest the operation of the assigned decree, it was a matter of discretion with the learned District Judge to allow the transferee to execute it and have his name substituted for that of his transferor in the record of the decree. Had the District Judge the same knowledge as we have of what has occurred since the affirmance by this Court of the original decree of this Court, he might have paused before he allowed the application to its full extent.

The substitution of the assignee's name in the record of the decree may, if the proceedings do reach the stage of an appeal to Her Majesty in Council, be embarrassing in some way hereafter which we cannot now foresee. At the same time I see no reason why the decree should not be carried into execution by the assignee in the name of his assignor, the judgment-creditor on the record, it being made to appear in a journal entry in the record who is the assignee who has been allowed to take out execution in his assignor's name. Section 339 of the Code says, that the transferee of a decree may apply for its execution by petition, adding "and if on that application the Court thinks fit, the transferee's name

may be substituted for that of the transferor's in the record of that decree"; it does not say it must be so. If counsel or the respondent is contented with this limited form of decree, I am prepared to vary the decree now appealed from accordingly.

LAWRIE, J.—I agree.

Varied.

——:o:——

Present:—LAWRIE and WITHERS, JJ.

(*February* 20 *and* 23, 1894.)

D. C., Colombo, No. C1,278. } RAYMOND v. SANMOGAM.

Fidei commissum—Will—Construction—Devise to devisee "and his lawful issues".

A testator devised a house to K. for her life, providing that, "at her death the same shall revert to my grandson R. and to his lawful issues, but neither the said R. nor his said children shall sell, mortgage, nor in any manner alienate the same, but if the said R. happen to die without any lawful issue, in that case the property shall revert to the children of A." K. having died leaving her surviving R. and his two children;—

Held, that this was an institution of R.'s issues or children as successive and subsidiary to their parent, and not an institution of parent and children as co-heirs, and that therefore the children took no interest until after R.'s death.

Partition.

The plaintiffs sought to have a house, situated in Chatham Street in the Fort of Colombo, partitioned among the parties to the action in the proportion of one-third to the 1st and 2nd plaintiffs who were husband and wife, one-third to the 3rd plaintiff, and one-third to the defendant. The plaint set out the following title:—The house belonged to Henrica Anthonia Christoffelsz, who died in 1865 leaving a will, whereby she devised the house to her daughter Mrs. Henrica Adriana Koenitsz, subject to the condition that Mrs. Koenitsz should have the free use and occupation of the same or enjoy the rents and profits thereof during her natural life, and at her death the same should revert to the testatrix's grandson John Andrew Raymond, the 1st plaintiff, and to his lawful issues, but that neither the said John Andrew Raymond nor his said children should sell mortgage or in any manner alienate the same nor sell nor mortgage the rents and profits thereof; that Mrs. Koenitsz accordingly had possession for life and died in October, 1878, leaving her surviving the 1st plaintiff, and his son the 3rd plaintiff, and another son Robert Raymond since deceased, each of whom became entitled to one-third share of the property; that 1st plaintiff on November 15, 1879, sold his interest to his father Andris (or Arnold) Raymond, who in December following sold to defendant. The 1st and 2nd plaintiffs claimed to have inherited the share of their deceased son Robert. The defendant in answer pleaded that Mrs. Christoffelsz in terms of the conveyance to herself dated 1828 had only a life interest in the property, which on her death passed absolutely to her son, defendant's vendor. Plaintiffs in reply pleaded that Andris Raymond had mortgaged to his mother Mrs. Christoffelsz all his interest under the deed of 1828, and that such interest having been sold in execution for the mortgage debt was purchased by his mother, who had thus become absolute owner of the property.

The District Judge held that by the execution purchase Mrs. Christoffelsz had become absolute owner, and entitled to devise the land by will, and he gave judgment as prayed by plaintiffs, decreeing a sale of the property.

The defendant appealed.

Layard, A.-G. (*Grenier* with him) for the appellant.

Dornhorst (*Wendt* with him) for the plaintiffs.

The following authorities were cited:—*D. C., Colombo* (*Special*) No. 84, *Freywer's case,* 3 *C. L. R.* 5; *Joachinoe* v. *Robertu,* 9 *S. C. C.* 101; *Wethered* v. *Wethered,* 2 Sim. 183; *Lyde* v. *Mynn,* 1 M. & K. 683; *Good* v. *Good* 7 E. & B. 295.

Cur. adv. vult.

On February 23, 1894, the following judgments were delivered:—

LAWRIE, J.—In the third paragraph of the plaint the plaintiffs set forth their title which rests on the following devise in a will dated May 2, 1862:—

"I do hereby give devise and bequeath unto my said daughter Henrica Adriana Koenistz all that house, &c., subject to the following conditions, that is to say, that the said Henrica Adriana Koenitsz shall have the free use and occupation of the said premises or enjoy the rents and profits thereof during her natural life and at her death the same shall revert to my grandson John Andrew Raymond and to his lawful issues, but neither the said John Andrew Raymond nor his said children shall sell mortgage nor in any manner alienate the same nor sell nor mortgage the rents and profits thereof, but if the said John Andrew Raymond happen to die without any lawful issue, in that case the said premises shall revert to the children of the third wife of Arnold Raymond subject to the same restrictions as aforesaid."

Mrs. Koenitsz, the life rentrix, died on October 29, 1878, survived by John Andiew Raymond, who at that date had living issue two sons.

John Andrew Raymond's interest in the house is now vested in the defendant. The question is, whether on the death of Mrs. Koenitsz the two sons of John Andrew Raymond succeeded under the will of 1868 each to one-third of the house as co-tenants with their father, or whether the latter alone succeeded, his sons' interest being postponed until his death, an event which has not yet occurred.

I am of opinion that a devise to A and to his lawful issues is a devise to A, whom failing to other issue, and is not a devise to the lawful issue immediately to hold share and share alike with their father. *VanLeeuwen* (*Kotze's Translation* p. 384): "If children are instituted together with their parents as if the testator says 'I appoint John his children and further descendants as my heirs' it is not considered that they are altogether called to the inheritance, but the one before the other, and on failure or predecease of one the other comes in his place by substitution."

The English authorities are to the same effect. In *Lyon* v. *Mitchell* (1 *Maddock* p. 467) Vice-Chancellor Plumer said: "The great question in this cause is, whether upon the true construction of the words of the will the four brothers took absolute estates, or whether the words 'the issue of their respective bodies' are to be considered as words of purchase and not of limitation, and that the four brothers are to be considered as entitled only for life, with remainder to their issue, as purchasers, or the issue to take as purchasers along with them, as tenants in common." That seems to me to be a statement of a case on all fours with the present. The Vice-Chancellor rejected the claim of the issue, and held that the four sons took an absolute interest.

In my opinion, this reading of the will now under consideration is consistent with its other provisions and with the intention of the testator. The plaintiffs have no present right to the house, and the action for partition must be dismissed with costs.

WITHERS, J,—This is a partition action, and the subject of it a house.

The first two plaintiffs claim a third share of the house; the 3rd plaintiff also claims a third share, and they resign a third share to the defendant.

The question for us to decide is, whether the plaintiffs are presently tenants in common with the defendant and have an immediate right to the possession of the premises.

They claim under the will of Mrs. H. A. Christoffelsz executed on the 2nd May, 1862. The testatrix died on the 30th of May, 1865. The tenant for life under that will on whose death the plaintiffs allege that they became entitled as tenant in common in fee to the house in question died on the 29th October, 1878. At the date of the will and at the date of the death of the testatrix, Mrs. Christoffelsz the 1st plaintiff, who is the person named and described in the will as her "grandson John Andrew Raymond", had no lawful issue. He had children, one of whom was apparently alive at the date of the will, by the 2nd plaintiff, whom he married on 1st May, 1873, a marriage which had the effect of legitimatizing the children born before wedlock. Hence at the death of Henrica Adriana Koenitsz—the daughter of the testatrix—the 1st plaintiff had lawful issue.

So much for the attendant circumstances. As for the will itself, the material part has been recited in my brother Lawrie's judgment, and I need do no more than refer to it.

It is for us to ascertain from the will, and what I may briefly call the surrounding circumstances, whether the intention of the testatrix was to devise the house in remainder on her daughter's death to her grandson, the 1st plaintiff, and his (legitimate) children jointly, or to him and to his children after him jointly. In the language of our law, was the institution of the children successive and subsidiary to their parent, the 1st plaintiff, or was it an institution for him and them as co-heirs? In the language of English law is the word "issues" or "children" a word of limitation or one of purchase?

To the authorities cited by my brother Lawrie in his judgment I would add that of *Byng* v. *Byng* 10 *H. L.* 171, not so much as an authority for the meaning of particular words in a Ceylon will as a guide to the construction of the will as a whole.

The head-note is this: "When there is a devise to A. B. and his children, and at the time of the devise he has no child, the word 'children' is *prima facie* a word of limitation, and the first taker shall have an estate tail; if he has children, it is *prima facie* a word of purchase, and gives a joint estate to him and his children as purchasers. But either of these constructions may be defeated by the plain intention of the testator to be collected from the whole of the will."

Now, it is clear from this will that the chief object of the bounty of the testatrix was her grandson the 1st plaintiff, with whose name was always associated his lawful issue or children. In the clause following the one which relates to the subject matter

of this suit a house was left to her grandson subject to a restraint against alienation, and on his death it was to go to his wife and children subject to similar restraints, and on his dying without lawful issues or unmarried the house was to go over to Mrs. C. J. Pieters. Then, in the next clause the 1st plaintiff was made sole residuary legatee with a provision as regards cash for the benefit of his wife and lawful issue in certain circumstances unnecessary to mention.

It seems to me just as clear that she intended to keep her real property in the family of her grandson, or to him and his lawful issue. This would be more effectively secured by his having the house ready to be taken up in succession by his lawful issue.

No doubt in the old Roman Law successive inheritances were favoured because they minimised the risk of the last will being inoperative for want of some one to take it up on the death of the testator, and to prevent an inheritance standing out vacant for a great length of time.

It struck me during argument that the direction in the will, that neither John Raymond nor his said children (*i. e.*, lawful issues) should alienate the house, argued an intention to keep the house in the family of the grandson for two sets of lines, his own and after him his children's. Mr. Dornhorst argued a contrary intention, that it restrained parent and children, as it were, *uno flatu*, and thus indicated them as co-heirs or "purchasers". In my opinion, after anxious reflection, I consider the words "lawful issues" to be words of substitutions intending that the children should succeed the parent.

This being so, the 1st plaintiff has no estate in the house, for he has parted with the entirety to the defendant, and 3rd plaintiff has no present claim to any share of the inheritance.

The action must accordingly be dismissed with costs. Judgment of the Court set aside accordingly.

Set Aside.

———:o:———

Present:—BONSER, C. J., and LAWRIE and WITHERS, JJ.

(*December* 5, 1893, *January*, 19 *and March* 20, 1894.)

D. C., Galle, No. 1,757. } ANTHONY *v*, CANNON.

Prescription—Possessions—Adverse title—Entry into possession with permission of owner—Ordinance No. 22 *of* 1871, *section* 3.

A person who has been in possession of land belonging to another for ten years previous to the institution of an action in terms of section 3 of Ordinance No. 22 of 1871, acquires title by prescription even though his possession originally commenced with the permission of the owner.

So *held* by BONSER, C. J., and WITHERS, J., *dissentiente* LAWRIE, J.

C. R., Batticaloa, No. 9,653, *Vand.* 44, approved and followed.

Action under section 247 of the Civil Procedure Code, to obtain a declaration of title to a house and premises seized in execution by the defendant as the property of his judgment debtors. The defendant contended that as part of the estate of plaintiff's deceased father the house and premises were vested in his executors, the defendant's judgment debtors.

The facts relative to the acquisitions by plaintiff of a prescriptive title to the land, as to which alone the case is reported, are fully disclosed in the judgment of the Court. The District Judge gave plaintiff judgment, holding that the case was on all fours with that of *Jain Carrim* v. *Rahim Dholl* (2 *C. L. R.* 118; 1 *S. C. R.* 282).

The defendant appealed.

The case was first argued on December 5, 1893, before Lawrie and Withers, JJ.; but their lordships not being able to agree upon a judgment, it now came on before the Full Court.

Dornhorst (*Wendt* with him) for the appellant. The plaintiff has not established a title by prescription. Her possession never was by a title "adverse" to that of her father. She occupied the house on sufferance, and never as owner. No doubt a party in possession could cease to acknowledge the title of him under whom he entered, may possess adversely and so acquire a prescriptive right; but in such case it is incumbent on him to show when the possession became "adverse", and that he has had such adverse possession for over ten years. In *Jain Carrim* v. *Rahim Dholl*, this Court held it proved that at a date more than ten years preceding action the precarious possession of the tenant had become the adverse possession of an owner, whereby a prescriptive title had been matured. Such proof is wanting here.

Grenier (*Van Langenberg* with him) for the plaintiff, contended that the plaintiff, having possessed the house in question for more than ten years prior to action, without paying rent or performing service, or doing any other act from which the acknowledgment of a right existing in another would fairly and naturally be inferred, had acquired prescriptive title. It was immaterial how the possession began, if only during the ten years none of the acts named were done. This was the true effect of the decision in

Jain Carrim v. *Rahim Dholl*, which followed the older decision in *Vanderstraaten*. The plaintiff was therefore entitled to the land as against the defendant's judgment-debtors.

Dornhorst in reply.

[The authorities cited during the argument are noticed in the judgments.]

Cur. adv. vult.

On March 20, 1894, the following judgments were delivered :—

LAWRIE, J.—The decision of this Court in 1870 in the Batticaloa case, reported in *Vanderstraaten* p. 44, settled a question on which there had been conflicting decisions, viz., that the possession of one co-owner could in law be adverse to or independent of that of another co-owner.

The grounds of the judgment involve the proposition that an adverse and independent possession for ten years entitle the possessor to a judgment, whatever be the title by which he entered into possession ; but the judges did not decide from what period the ten years shall commence to run. When a possession originally depended becomes adverse and independent and whether the possession for the ten years immediately preceding the action was adverse and independent, must depend on the circumstances of each case. When the possession has been *ut dominus*, not merely a physical possession, but a possession as owner, if it be continued for ten years, title is acquired. If, on the other hand, the possession though physical has not been as owner, then, though it be continued for ten years, no title is acquired.

This is illustrated by the case of a usufructuary mortgagee. He may possess undisturbedly and uninterruptedly without payment of rent or produce or performance of service or duty or without doing any act within the ten years from which an acknowledgement of a right existing in another person could fairly and naturally be inferred, and still a multitude of decisions assert that ten years' possession confer on such a mortgagee no right. *Morg. Dig.* pp. 2, 5, 7, 10, 281, 419, 436 ; *Ramanathan* (1843) p. 25 ; 1 *Lorenz* p. 221 ; 2 *Lorenz* p. 31 ; 2 *Lorenz* p. 38. I need not multiply instances where this rule was applied.

Again, the same rule is applied to the case of trustees. No trustees can prescribe against the person for whose benefit the trust was created: *Ramanathan* (1820) p. 56 ; *Austin's Reports* p. 21. Nor can an executor prescribe against the heirs or devisees: 3 *Grenier* (1874) p. 49. Nor can a donee under a revocable Kandyan deed of gift: *Austin* p. 106 ; *Austin* p. 143 ; *Austin* p. 218 ; 3 *Lorenz* p 129. It was decided in 1841, *Austin* p. 86, that a prescriptive title cannot be gained by possession of a man who got land on condition of performing services although the services were not performed ; and again in 1846, *Austin* p. 112, that when a man was allowed by a decree to retain land until compensation was paid to him, he did not gain a prescriptive title though the payment was deferred and the land was possessed for more than ten years. Quite lately, Burnside, C. J., and Dias J., 1 *S. C. R.* p. 64 decided that a step-mother could not by mere possession prescribe against the step-children.

This mass of authorities satisfies me that Jeremie, J., rightly laid down the law to be (*Morg. Dig.* p. 169): 1. That a possessor is always presumed to hold in his own right and as proprietor until the contrary be demonstrated. 2. That the contrary being demonstrated, and it being shewn that the possession commenced by virtue of some other title such as that of tenant or planter, then the possessor is to be presumed to have contined to hold on the same terms until he distinctly proves that his title has changed. This judgment was described as admirable, and was repeated with approval by Creasy, C. J., and Temple, J., in 1862 : *Ramanathan* 1860-62, p. 145.

I think that this is not inconsistent with the judgment in the Batticaloa case. That case implies that the burden of proving the requisite possession lies on the party averring it; and when the party averring a prescriptive title admits that at the commencement his possession was not *ut dominus* but dependent on another, then the party is bound to prove something more than mere continuous possession—he must prove facts which shew that the title by which he commenced to possess changed and that from a given time he possessed not dependently but independently of the owner.

The plaintiff in this case has admitted that the land belonged to her father, that she entered into possession by his permission, that he never at any time expressed the slighest intention of giving the house to her, and that he never did give it to her. These admissions by her and her failure to prove that the dependent title on which her possession commenced was ever changed to an independent title seem to me to distinguish this case from that decided by Burnside, C. J. and me, and reported 1 *S. C. R.* p. 282.

I am of opinion that the plaintiff has failed to prove such a possession as gives title under the Ordinance, and I would dismiss the action with costs.

WITHERS, J.—The point for determination is, whether the plaintiff has proved her case so as to satisfy the requirements of the Ord. No. 8 of 1834

and to entitle her to a decree for the house in question. It is not pretended that she can establish her claim in any other way. Her case is briefly this. Some twenty-five years ago she obtained her father's permission to occupy this house. She was at that time married in community of estate. She and her husband lived in the house by themselves until the latter's death some seventeen years previous to the present action, and since his death she has been living in it up till now. Her story is—and the District Judge prefers to believe it rather than her brother's—that from the first she occupied the house rent free, repaired it from time to time at her own expense, and paid municipal taxes on account of it.

The circumstances of the case appear to me to come within the scope of the judgment of this Court in *C. R., Batticaloa* No. 9,653 reported at page 44 of *Vanderstraaten's Reports* 1869-1871. I think we are bound by that judgment.

According to that decision, as I understand it, the words of section 2 of the Ordinance referred to, "a possession unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred", are the exact equivalent by way of exhaustive definition for the preceding words, possession "by a title adverse to and independent of" that of the other party. Further, the possession must have been undisturbed and uninterrupted, and must have existed for ten years previous to action brought. For ten years previous to this action the plaintiff's possession was undisturbed and uninterrupted and unqualified by any act acknowledging title in another.

But, then, it is asked, how can a tenant-at-will acquire possession against a landlord as long as that tenancy is undetermined and where, as in this case, there is no suggestion that the tenancy was ever formally determined? To answer this question it is necesssary to ascertain the meaning of the word "possession", and the significance of the word must be looked for in the Ordinance itself.

By our common law, possession contains two elements: (1) exclusive power to deal with a thing, *i.e.*, corpus, (2) the intention to keep that thing for oneself *animus possidendi* or *rem sibi habendi*. And no doubt the second element is incompatible with the state of mind of a person who hires a thing from its owner and in so doing acknowledges title in him.

But, to paraphrase our Ordinance, it says this: Once given exclusive power to deal with immoveable property, if that power is continuously exercised without disturbance and interruption and without any act of acknowledgment of another's title for ten years previous to action brought, the *animus possidendi* shall be imputed to him who has so exclusively exercised that power, if he chooses to claim the property for himself, and a decree shall be awarded him accordingly.

The right which ripens into a statutory title therefore begins to run from the date of entry into possession or the last breach, if any, of the required continuity of poesession.

I would affirm the judgment for plaintiff with costs.

BONSER, C. J.—I agree with my brother Withers that the plaintiff should have judgment in this case. The evidence proves that for upwards of ten years before the institution of this action she had been in continuous possession of the property, the subject of the action, and that such possession was "unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which the acknowledgment of a right existing in another person would fairly and naturally be inferred"; and further that her possession was not of such a nature as that it enured to the benefit of another. That being so, I think that we are bound, by the judgment of the Full Court in an anonymous case reported in *Vanderstraaten Reports* p. 44, to hold that she has acquired a good title for the property by virtue of section 3 of Ordinance No. 22 of 1871. That case has never been overruled, although no doubt there are several decisions of this Court which it is difficult to reconcile with it; but it was expressly approved as recently as 1892 by Burnside, C. J., in the case of *Carrim v. Pakeer*, 1. *S. C. R.* 282, and is in my opinion still a binding authority. But apart from authority I am of opinion that the interpretation placed by the Full Court in the case referred to on that difficult section of an inartificially drawn Ordinance, although not altogether satisfactory, to my mind is more satisfactory and less open to objection than any other that has been suggested, and it has the merit of furthering the beneficial operation of the Ordinance.

Affirmed.

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Present:—LAWRIE and WITHERS, JJ.

(*March* 3 *and* 20, *April* 27, *and May* 4, 1894.)

D. C., Kalutara, No. 847. } FERNANDO v. WEERASINHE.

Civil Procedure—Minor—Action by minor—Curator—Certificate—One curator for several minors—Next friend—Guardian ad litem—Minor suing on contract between curator and third party—Civil Procedure Code, chapters xxxv. and xl.

Under chap. xl. of the Civil Procedure Code, is not necessary, in the case of several minors, to issue a separate certificate of curatorship for each minor, but one curator may be appointed and one certificate issued to him in respect of all the minors.

A minor cannot sue or defend by a curator appointed under chap. xl. of the Code, but can only do so by a next friend or guardian for the action, as the case may be, appointed under chap. xxxv. Therefore, if a person, to whom a certificate of curatorship has been issued in respect of the estate of a minor, desires to bring an action in the name of the minor, he must first have himself specially appointed next friend of the minor for that purpose.

The plaintiff, a minor, sued the defendants for breach of covenants contained in a lease dated April 30, 1892. The caption of the plaint described the plaintiff as suing "by her curatrix Michaela Fernando". The plaint alleged that Michaela Fernando was on March 31, 1892, appointed curatrix of the property of the plaintiff, and a certificate of curatorship dated March 31, 1892, was issued to her in respect of the said property, and that Michaela Fernando as such curatrix entered into the lease above-mentioned with the defendants. It appeared that the certificate of curatorship issued to Michaela Fernando was not only in respect of the estate of the plaintiff, but of several other minors. The defendants in their answers, among other things, pleaded that the certificate of curatorship was void and of no avail in law, inasmuch as it was a certificate over the property of several minors, and that there ought to be a separate certificate for each minor. The District Judge upheld the defendants' contention, and dismissed the plaintiff's action.

The plaintiff appealed.

Wendt (*Fernando* with him) for the appellant. No reason appears why the certificate, if regular in other respects, should be held bad because it deals with the estates of more than one minor. In the present instance, the certificate is granted to the mother in respect of the children's estate. In such a case, the children's property would all be inherited from their father and owned by them in common, and a single certificate would be appropriate. The Stamp Ordinance merely requires every certificate to be stamped, and this one bears the proper stamp. It need not, it is submitted, be stamped separately in respect of each minor's estate.

Dornhorst for the defendants. The estate of each minor would have to be treated separately from that of the others, and separate accounts filed. There should therefore be a separate certificate of curatorship in each case. The question touches the revenue, for whereas there should have been four stamps, only one has been used.

The Court subsequently intimated that they considered the certificate sufficient, and heard counsel on the further question, whether assuming the curatrix had been duly appointed, she could sue on behalf of the minors without being duly appointed next friend. On this point sections 476 and 582 of the Civil Procedure Code were discussed.

Cur. adv. vult.

On May 4, 1894, the following judgments were delivered :—

LAWRIE, J.—The question raised in this appeal was, whether the appointment of Michaela Fernando as curatrix of a Maria Catherine Fernando was void and of no avail because the certificate appointed her to be curatrix to three other minors as well as to Maria Chatherine. It was contended that it was necessary that there should be separate certificate for each minor's estate. Apart from any question under the Stamp Ordinance (a matter not before us), there is in my opinion no objection to one application being entertained and one curator being appointed to several minors under chap. xl., or to one next friend or guardian for the action being appointed to several minors under chapter xxxv.

We cannot, however, in fairness to the parties set aside this judgment and remit the case to the District Court for further procedure, because we are of opinion that the action is misconceived. The plaintiff is the minor. She sues on a contract of lease entered into between her curatrix and the defendants. It is clear that in such an action the curatrix herself should be the plaintiff. The minor has no title to sue, having been no party to the contract.

On the further question whether a curator who has obtained a certificate under chap. xl. is entitled to institute or defend actions in the name of the minor without having been appointed next friend or guardian for the action under chap. xxxv., my opinion is that he cannot, and that not even a curator duly appointed by the Court can institute or defend actions in the minor's name without the express sanction of the Court obtained on an application to be made next friend.

On these grounds I would affirm the judgment dismissing the action, but not for the reasons given by the District Judge. The curatrix personally should pay the defendants' costs.

WITHERS, J.—I agree.

Affirmed.

Present :—LAWRIE and WITHERS, JJ.

(*March* 20, *and April* 13, 1894.)

D. C. Negombo, No. 15,078. } KANNAPPA CHETTY v. CROOS.

Practice—Certifying payments to court after decree—Petition—Affidavit—Civil Procedure Code, sections 349, 376.

Section 349 of the Civil Procedure Code enacts: "If any money payable under a decree is paid out of court or the decree is otherwise adjusted in who'e or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the court whose duty it is to execute the decree. The judgment-debtor may also by petition inform the court of such payment or adjustment and apply to the court to issue a notice to the decree-holder to shew cause on a day to be fixed by the court why such payment or adjustment should not be recorded as certified."

Held, that where the judgment-debtor applies under the above section it is not enough to present a petition alleging the payment or adjustment, but the petition must be supported by affidavit or deposition on oath before notice to shew cause can be issued.

Appeal by decree-holder from an order made at the instance of the judgment-debtor recording certain payments in part satisfaction of the decree as certified under section 349 of the Code.

The facts of the case sufficiently appear in the judgments of the Supreme Court.

Wendt, for the appellant.

Dornhorst, for the judgment-debtor.

Cur. adv. vult.

On April 13, 1894, the following judgments were delivered :—

LAWRIE, J.—Here a petition by a judgment-debtor was entertained and a notice issued on the decree-holder to show cause why the payments mentioned in the petition should not be recorded as certified and writ recalled for adjustment. That petition was not supported by affidavit. The petitioner did not pledge himself by oath or affirmation to the truth of the statements made in the petition. Even the receipts were not before the court—these had to be specially called for more than a month afterwards. When the day fixed for the hearing of the matter of the petition arrived, the petitioner called the judgment-creditor who gave evidence which seemed to the learned judge to be so halting and lame that he held that the defendant was entitled to credit for the item of Rs. 900 of which the creditor had disputed the payment. It may be that the learned judge was right in his estimate of the plaintiff's evidence, but we must insist on regularity of procedure in such matters, and in my opinion there is no doubt that a petition under section 349 by which a judgment-debtor informs the court that money payable under a decree has been paid out of court must be accompanied by an affidavit and by such other documentary evidence as is requisite to furnish *primâ facie* proof of the material facts set out or alleged in the petition unless the court permits the petitioner to adduce oral evidence for that purpose. I agree to set aside the order and to send the case back in order that the petitioner may (if so advised) furnish the *primâ facie* proof required by section 376 of the Code and for such further proceedings as may be necessary according to law.

WITHERS, J.—The question for determination is whether in addition to two items of Rs. 500 and Rs. 1,400 admittedly paid in part settlement of an unsatisfied decree held by the plaintiff against the defendant, a sum of Rs. 900 should be recorded as a further certified payment in satisfaction of the judgment debt. The question arises on a petition of the judgment-debtor who under section 349 of the Civil Procedure Code applied to the court for a record in the minutes of the proceedings in this action of a further payment of the said sum of Rs. 900 alleged to have been made by the defendant on June 17, 1891, on account of the decree held by the plaintiff, to one Kanappa Chetty as agent of the plaintiff competent to receive that sum and grant an acknowledgment in discharge thereof.

The acknowledgment of this sum is said to be a receipt (exhibit B, page 42) which is purported to be granted to the defendant in part satisfaction of the judgment recovered against him in this action by the plaintiff by a person signing himself "Muna "Runa Rawana Kanappa Chetty's partner Muna "Runa Rawana Kanappa Chetty." The course of procedure to be adopted by a petitioning debtor under this section was much discussed before us and it is important to have this point of practice settled. It was contended for the respondent that it was sufficient for a judgment-debtor to present a petition making out a *primâ facie* case of payment to his judgment-creditor of a sum in part satisfaction of the judgment and that it then was incumbent on the creditor on being noticed to appear on a certain day fixed for that purpose to appear and show cause why such payment should not be recorded as certified.

This contention no doubt has the letter of the Code to support it, but I cannot believe that it was intended that an applicant for this form of protective relief should be permitted to dispense with the obligation of supporting a petition by affidavit or deposition on oath which is laid on all persons who invite a court's interference on their behalf. It forcibly strikes me that an application of this kind

is in the nature of summary procedure, though not actually declared to be by way of summary procedure with all its attendant forms, and that a petition for this particular relief should be supported by affidavit. It seems only right and just that an application to which a respondent must shew cause why the prayer should not be granted should be so supported before notice to shew cause is issued upon it. Notice having issued in such a case, the onus is laid on the respondent of shewing cause, *i. e.*, of satisfying the court's conscience in a clear and positive manner that no payment of the kind should be recorded against him.

What happened was this. On the day of enquiry, the defendant called as a witness in his behalf his judgment-creditor who swore that he had been trading with another up to February, 1889, under the name and style of Mu. Ru. Ra. Tha., and that after that date he had been solely trading under the name and style of Wi. Ka. Na.—a statement which he afterwards appears to have qualified by saying that his son Chellappa, a young boy of 12 or 13 years of age, was a partner in his business. I do not attach much to this qualification, because, though by Hindu custom this lad may have to be treated between his father and himself as a partner, a boy of that age is not competent to enter into the legal relation of partnership and contract with third parties. No doubt this witness admits that a namesake of his, one Kanappa Chetty, was his servant for two years bearing the same name and initials, and that he left Rs. 10,000 with him to carry on transactions on his account, apparently when he (the witness) left Ceylon in May 1890 for India where he remained till some time in 1892 when this other Kanappa Chetty left him. And although this witness says that no one was authorised during his absence on the Coast to receive and give a discharge for debts owing to him by the defendant, if the Rs. 900 were really and truly paid by the applicant to the namesake who under the same name and initials as the judgment-creditor transacted business for him while he was out of Ceylon, and if that namesake received that money and granted the receipt for it (exhibit B), the judgment-creditor would have to show cause in my opinion why that sum should not be certified as payment *pro tanto* of the judgment on this record.

The applicant has, however, for some reason or other, refrained from deposing that he did really and truly pay this amount to the person who acted, as before mentioned, for the creditor during his absence from Ceylon.

To judge by a passage in the creditor's deposition, this person appears to have returned to the island, and if so and he is the Kanappa Chetty who acted for the plaintiff, I think in the interests of justice and in aid of this enquiry, he, as well as the applicant, should lead some evidence in support of the matter of the application.

For this purpose I would remit the case, setting aside the order herein and leaving the costs in appeal to abide the event.

Set aside.

———:o:———

Present :—LAWRIE and WITHERS, JJ.

(*March* 6 *and* 9, 1894.)

D. C. Kandy, No. 6,474. } TIKIRI BANDA v. RATWATTE.

Administration —Heir transferring intestate's property pending administration—Effect of such transfer.

Succession to an intestate's estate devolves immediately upon his death, and it is competent for the heirs-at-law to alienate the property pending the administration of the estate. Such alienation vests good title in the alienee, subject only to be defeated by proper disposal of the property by the administrator in due course of administration.

Wegodapola Loku Kumarihamy died intestate and without issue in 1883, possessed of two nindagamas, and letters of administration to her estate were granted to first defendant on November 24. 1884. The first defendant as administrator on December 3, 1886, sold and conveyed the nindagamas to his father-in-law Talgahagoda Tikiri Banda, who on November 12, 1887, sold and conveyed them to the second defendant, wife of the first defendant. Plaintiff alleged that on Loku Kumarihamy's death the nindagamas devolved on her father Mudianse as her sole heir, who on January 21, 1886, sold and conveyed them to plaintiff and Giragama Diwe Nillame, the latter on March 24, 1892, conveying his moiety to plaintiff, who thus claimed to be solely entitled to the property. Independently of these conveyances, plaintiff based his claim on his being the only son and sole heir of Mudianse. Plaintiff impeached the first defendant's and Tikiri Banda's sales as fraudulent, and made for grossly inadequate consideration, and complained of wrongful possession by the defendants since December 1886; and he prayed that the conveyances be declared void, and himself entitled to the nindagamas, or in the alternative that they be declared the property of the estate and first defendant directed to convey them to plaintiff.

The district judge held that plaintiff was not the son or heir of Mudianse, and that plaintiff's claim by virtue of the conveyances failed because at the date of Mudianse's conveyance the property was vested in first defendant as administrator, and the

former could not therefore transfer any title to the nindagamas. The learned judge therefore dismissed the action, without entering into the question of fraud.

The plaintiff appealed.

Layard, A.-G., for the appellant, contended that, immediately upon the Kumarihamy's death, the property had vested in her sole heir, her father, *D. C. Colombo, No.* C 1187, 2 C. L. R. 72. The latter's conveyance of the lands would doubtless be subject to any proper disposition the administrator might make in the course of administration. But if recourse to these lands become unnecessary, the heir's conveyance would pass a good title to his vendee.

Dornhorst, (*Wendt* with him) for the defendants, argued that the property of an intestate was so fully vested in the administrator, that after the grant of letters no dealing with property by the heirs should be recognised. Many cases had occurred in which an administrator appointed after alienation by the heirs had even then been held entitled, but not one could be cited in which the heirs were permitted to transfer the intestate's property pending administration by an administrator duly appointed.

Layard in reply.

Cur. adv. vult.

On March 9, 1894, the following judgments were delivered :—

Withers, J.—The learned judge has dismissed the plaintiff's action on the ground that the heir-at-law of Loku Kumari Hamy dying intestate had no interest in that lady's estate transmissible to another, because before the conveyance by the heir-at-law a person had been appointed administrator of the estate of the late Loku Kumari Hamy. I take it, however, that by our law succession devolves instantly upon death and the successor takes the estate subject to administration, if any.

There is no doubt that immediately on the appointment of an administrator to Loku Kumari Hamy's estate, the legal estate vested in that person for the purposes of administration, and the heir-at-law had only an equitable interest which would be lost to him on the alienation of the property in due course of administration. The plaintiff comes forward as the purchaser from the alleged heir-at-law of the late Loku Kumari Hamy of his equitable interest in certain nindegama property and he brings this action against the administrator and a third party in possession of those properties under a title from the administrator, and this title he seeks to impeach on the ground of fraud and collusion to which the party in possession of the lands (it is alleged) was privy, and the object of this action is to have the transfer from the administrator to one Tikiri Banda and from Tikiri Banda to the second defendant set aside as fraudulent, and the first defendant as administrator of the estate directed to convey those properties to the plaintiff.

If the plaintiff proves that the late Kumari Hamy's father, Wegodapola Mudianse, was her sole heir at law, and if he proves the mesne conveyances to him of these properties from W. Mudianse, and if he proves the second defendant's possession of those properties, and if her title has been procured by fraud to which she was a party, I think, subject to anything which may depend upon plaintiff's apparent laches, he will have shown a right to some part at all events of the relief claimed by him in this action.

The case should go back for the trial of the undetermined issues. Plaintiff will have his costs in appeal.

Lawrie, J.—I agree.

Set aside.

———:o:———

Present :—Lawrie and Withers, JJ.

(*May* 16 *and* 18, 1894.)

D. C. Matara, No. 633. } Abeyagoonewardene v. Andris Appoo.

Registration of titles—Registered mortgage—Subsequent sale by mortgagor registered—Purchase in execution of decree to enforce mortgage—Priority—Ordinance No. 3 *of* 1863, *section* 39.

The owner of land mortgaged it in 1878, and pending the mortgage sold and conveyed it to defendant in January 1880. The mortgage was registered in June 1880, and the conveyance in August 1880. In 1882 the mortgagee brought against the mortgagor an action (to which defendant was not a party) to realise the mortgage, and obtained a decree in June 1882, in execution of which he purchased the land himself in October 1882, and having obtained a fiscal's conveyance dated December 1889, sold and conveyed the land to plaintiff, who now sued defendant in ejectment.

Held, affirming the decision of the district court, that plaintiff had no title to the land as against the defendant.

Action for a declaration of title to a half-share of certain land.

The half share in question belonged to one Theodoris, who by bond dated June 30, 1878 (registered on June 15, 1880) mortgaged it to one Ferdinandus, and by deed dated January 13, 1880 (registered on August 16, 1880) sold and conveyed it to defendant. On February 9, 1882, Ferdinandus sued Theodoris

for the mortgage-debt, and on June 26 following obtained a decree for it, which did not name or describe the land but merely declared "the property specially "mortgaged is declared bound and executable under "this judgment." Ferdinandus himself on October 11, 1882, bought the half share in execution of this decree but did not obtain a Fiscal's conveyance until December 12, 1889, (registered on December 31) and without even having had possession he sold and conveyed to plaintiff on January 19, 1890. Plaintiff in the present action complained that defendant had dispossessed him in July 1891. The defendant in answer pleaded that he had been in possession since his purchase in 1880 and that, not having been made a party to the mortgage suit, he was not bound by the decree, but was entitled to possession by virtue of his prior purchase.

The district judge held that plaintiff could not refer his title back to the date of the mortgage, the competition as to title being between the two conveyances, viz. that by the mortgagor to the defendant, and that by the Fiscal to plaintiff. Defendant's conveyance being prior in both date and registration, it prevailed over plaintiff's, whose action was accordingly dismissed.

The plaintiff appealed.

VanLangenberg, for the appellant, argued that plaintiff's title to the share of land in question was superior to that of defendant. Plaintiff's purchase at the Fiscal's sale related back to the date of the mortgage, and (that mortgage having been registered prior to the registration of the conveyance to defendant) the sale in satisfaction of it wiped out any interest acquired by defendant subject to that mortgage. (*Sinnan* v. *Nicholas*, 9 S. C. C. 93; *Marimuttu* v. *Soysa*, 8 S. C. C. 121.) The case last cited establishes that defendant (who was not in possession under his purchase) was not entitled to be joined in the mortgage suit, and that the decree in that suit binds him as a privy in estate of the mortgagor.

Wendt, for the defendant, contended that whatever advantage plaintiff could derive from the registered mortgage was dependent solely on there having been a proper mortgage decree. (*Sinnan* v. *Nicholas.*) Otherwise, the purchaser took only such interest as the mortgagor had at the date of sale, and that in the present case was nil. The mortgage decree here is fatally defective: it does not identify the land to be affected, nor the debt for which the charge is declared. The case is therefore simply one of two sales of the owner's interest, and defendant's purchase is prior both in date and registration to the plaintiff's. In the case of *Sinnan* v. *Nicholas* no sale in execution of the mortgage had yet taken place, but the mortgagee when he seized the property was met by a claim on the part of a transferee from the mortgagor and then brought that action to have the land declared executable. Here the defendant was vested with the property and the right to redeem at date of the mortgage suit, and plaintiff seeks practically to foreclose against him in a suit to which he was no party.

Cur. adv. vult.

On May 18, 1894, the following judgments were delivered:—

Withers, J.—The question we are called upon to decide is, whether the prior registration of a mortgage securing by bond the payment of a debt will enure to the benefit of an ultimate purchaser in execution of a mortgage decree obtained in an action against the mortgagor to recover the debt and realise the security, so that the ultimate purchaser will have a better *title to the land* than one who purchased the land from the mortgagor under a private conveyance subsequent to the mortgage referred to and registered after the registration of the mortgage but before the mortgage decree.

It was contended by Mr. VanLangenberg that the prior registration of the mortgage operated so as to make the ultimate purchaser's *title to the land* relate back to the date of the mortgage with the effect of squeezing out an intervening purchase of a later registration, and, as it were, blotting out the title of the intervening purchaser. If a Ceylon mortgage was the same as an English mortgage in Common Law, there would be much force in Mr. VanLangenberg's contention, but the Ceylon mortgage passes no interest in the land. It is no more than a charge on the land, and the mortgagee's right under such a mortgage is to have the land judicially sold in satisfaction of the debt secured by the mortgage.

At the date of the judicial sale of the land in question, the mortgagor had divested himself of all estate in the land by a private conveyance. No doubt it has been the practice of courts in this Island in mortgage actions to direct that a judicial sale in execution of a mortgage decree shall take effect from the date of the mortgage, but this is not for the impossible purpose of antedating *title to the land* in the event of the execution-creditor becoming a purchaser at the auction in execution of his mortgage

decree, but for the purpose of giving full effect to his charge on the proceeds in the event of a third party becoming the purchaser, and so insuring his priority over mortgages later than his own and not registered before his.

In my opinion the judgment of the learned judge is right and must be affirmed with costs.

LAWRIE, J. concurred.

Affirmed.

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Present :—BONSER, C. J.

(*May* 25 *and June* 7, 1894.)

P. C. Jaffna, No. 12,570. } CHELLAPPA v. MURUKASER.

Criminal law—Public nuisance—Obstruction of a public way—Abatement—Claim of right—Power of police magistrate to decide title—Jurisdiction—Criminal Procedure Code, section 115.

In a proceeding under section 115 of the Criminal Procedure Code for the removal of an obstruction or nuisance from a public way, the police magistrate has no jurisdiction to inquire into or decide any question of title set up by the defendant.

The course to be followed, where a claim of right is made, pointed out.

Appeal from an order requiring the defendants to remove certain obstructions from an alleged public footway.

The facts material to this report are set out in the judgment of the Supreme Court.

Senathirajah for the appellants.

There was no appearance for the complainant.

Cur. adv. vult.

On June 7, 1894, the following judgment was delivered :—

BONSER, C. J.—This is an appeal from an order of Mr. Woodhouse, acting police magistrate of Jaffna, made on April 14, 1894, whereby the two appellants, and two others who have not lodged an appeal, were "ordered in terms of section 119 of "the Criminal Procedure Code, that they will before "the 30th day of April, 1894, remove all obstructions, "whether fences, walls or gates or any other thing "which renders it impossible, dangerous, difficult "or inconvenient for foot passengers to use the way "in question, and thereafter ever to refrain from in "any way causing obstruction to the public in the "lawful exercise of their right of using the way as "a footway."

It appears that the appellants, and the two other defendants, who have not appealed, recently purchased the land over which the alleged footway ran, and have fenced the land in, thus completely stopping up the path. On the complaint of the village Odear, the then acting police magistrate of Jaffna, Mr. Constantine, directed a conditional order to issue, under section 115 of the Criminal Procedure Code, to the defendants, "to remove the six fences "in the path in question by March 15, or to appear "on that day, and show cause why the order should "not be enforced." The case came on subsequently before Mr. Woodhouse, who after hearing evidence for the complainant and defendants, made the order complained of. On the hearing of the appeal, no one appeared for the respondent, and I had not the advantage of hearing any argument in support of the order. The counsel for the appellants urged that, inasmuch as the appellants claimed the land as their own, free from any right of way, the police magistrate ought not to have made any order, but should have held his hand until this question had been decided by a civil court, and referred me to a case of *Abeyratne Ratwatte* v. *Pethan Cangany*, 7 S. C. C. 81, decided in 1885, by FLEMING Acting Chief Justice, in which that learned judge said :—"It appears to me that when a person "is proceeded against under section 115 of the "Criminal Procedure Code for having committed a "public nuisance by causing an obstruction, there "must be no doubt that the place on which the "unlawful obstruction is said to have been caused is "a way which may be lawfully used by the public. "When there is a *bonâ fide* objection raised with "regard to the point by the person against whom "the conditional order is made by a police magis- "trate, the magistrate should, in my opinion, refrain "from giving effect to his order until the question of "right of way has been decided by a competent tri- "bunal. The Legislature could not have intended "that a police magistrate or jury should, in proceed- "ings taken under Chapter X of the Criminal Pro- "cedure Code, decide proprietary rights which may "very seriously affect the individuals concerned."

I reserved judgment in order that I might ascertain whether there were not other decisions of the Court on this point. Since the argument I have been referred to a case of *Chuppen Tampar* v. *Vairavy Vessuvar*, decided in 1887, and reported in 8 S. C. C. 119, where CLARENCE J. held that it was the intention of the Legislature to give a police magistrate authority to decide questions of title arising under Chapter X of the Criminal Procedure Code. It would, however, appear that the case of *Abeyratne Ratwatte* v. *Pethan Cangany* was not cited. I have not been able to find any other case decided in this Court where the point now raised has been dealt with,

and in this state of things, there being two conflicting decisions of co-ordinate authority, I am free to decide this case apart from authority.

It is a rule of English law that when the title to property comes into question, the jurisdiction of Justices is ousted. That rule probably had its origin partly in the fact that the courts of Justices of the Peace were unknown to the common law, and partly in the quasi-sacred character with which a free-hold estate was invested in the eyes of English lawyers. It was felt that so important a matter as the question of title to land should be reserved for the decision of the constitutional tribunals of the country. But whatever be its origin, the rule is well established. Of course the rule does not apply to cases where the Legislature has either expressly or by necessary implication provided that the jurisdiction is to be exercised in any event.

The question, therefore, in the present case is, whether the Legislature of this Colony has or has not sufficiently indicated its intention that police magistrates should exercise the powers given by Chapter X of the Criminal Procedure Code in cases where a *bona fide* question of title to land arises. Having regard to the fact that police magistrates in the Colony are, for the most part, persons without legal qualifications or training, the presumption would be against such an intention. The material words of section 115 of the Criminal Procedure Code, under which the police magistrate acted, are as follows ;—"Whenever a police magistrate considers * * * * "any unlawful obstruction or nuisance should be "removed from any way * * * which is or may be "lawfully used by the public or from any public "place * * * such police magistrate may make a "conditional order requiring the person causing "such obstruction or nuisance to remove such "obstruction or nuisance * * * or to appear "at a time and place to be fixed by the order and "move to have the order set aside or modified." It appears to me that these words would be satisfied by confining the exercise of the jurisdiction to cases where the right of way was admitted, but the fact of obstruction or nuisance was disputed.

It is material to observe that section 115 and the other sections of Chapter X of the Criminal Procedure Code are taken bodily from the Indian Criminal Procedure Code of 1882, where they also form Chapter X, and that those sections appeared in substantially the same form in the Indian Criminal Procedure Code for which the Code of 1882 was substituted. Previous to the adoption of these sections in the Ceylon Criminal Procedure Code there had been a series of decisions in the Indian Courts on the corresponding sections of the Indian Code to the effect that they did not authorise an enquiry by a police magistrate into disputed questions of title. The Legislature of this Colony cannot be taken to have been ignorant of the construction which had been placed on those sections by the Indian Courts, and I think it is not unreasonable to infer that, in adopting those sections without alteration, our Legislature was satisfied with that construction. In 1888, this question was again fully considered by the High Court of Calcutta in the case of *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee*, I. L. R. 15 Cal. 564, and the previous decisions were reviewed and affirmed.

The decisions of the Indian High Courts are not binding on this Court; yet, especially where they deal with the construction of the Indian enactments, which have been adopted without alteration by this Colony, they are deserving of respect and serve as useful guides.

In the case just referred to, the court, after pointing out that the action of the police magistrate is not to be trammelled by a mere assertion of right made without fair ground or honest belief in it or honest intention to support it, proceeds to prescribe the course to be followed by a police magistrate in administering the provisions of section 133 of the Indian Criminal Procedure Code, which corresponds to section 115 of our Code, in the following words ;—"He should consider, "having regard to what has been said above, "whether the claim is made *bona fide* ; and, if, on a "fair consideration of the matter, and remembering "how scrupulously private rights should be respected, he thinks the claim not *bona fide*, he should "record his reasons for thinking so, and decide the "case without further reference to the claim. It is "for the defendant to set it up, and unless he does "so the magistrate has nothing to do with it, and "the defendant must set it up at or before the hearing. Of course if the magistrate, on hearing the "defendant, thinks his claim of right well founded, "he will take no further proceedings : for in that "case it will have been shown to him that section "133 does not apply to the case. If the magistrate "does not think this claim well founded, so far as he "can judge, but considers that it is made *bona fide*, "he should allow the defendant an opportunity of "asserting it by civil proceedings. The existence of "an intention or desire to do this is one test of *bona* "*fides*. If the defendant does not, within a reasonable time, assert his right, the magistrate may "proceed. If the defendant does so with success, "the public right, which is the foundation of the "proceedings under section 133, is either negatived, "or shown to be so doubtful that the magistrate

"ought not to proceed further. If the defendant "does not go into a civil court within a reasonable "time, or fails there, the magistrate may proceed."

The course there laid down appears to me to be a convenient one, and one which should be followed by police magistrates in this Colony.

The order absolute made in this case is therefore quashed, and the case referred back to the police magistrate to act in accordance with my opinion. With regard to the order made by Mr. Woodhouse in this case, it is in my opinion incorrect in taking the form of a general injunction. It should have been limited to making absolute the conditional order and requiring the defendants to obey it within a stated time. Form No. 18 in Schedule III to the Criminal Procedure Code can easily be adapted to the simple case of a conditional order made absolute by a police magistrate after hearing evidence without a jury.

Set aside.

———:o:———

Present :—LAWRIE and WITHERS, JJ.

(*March* 7 *and* 9, 1894.)

D. C. Galle, No. 54,732. } SILVA v. UPARIS.

Fiscal's sale—Material irregularity in conducting sale—Decree-holder bidding and purchasing without sanction of court—Civil Procedure Code, sections 272, 282.

The fact of the decree-holder bidding and purchasing at an execution sale without the previous sanction of the court, required by section 272 of the Civil Procedure Code, is not a material irregularity in the publishing or conducting of the sale within the meaning of section 282.

Application by a judgment-debter under section 282 of the Civil Procedure Code to set aside execution sales of his lands. The irregularities relied upon were, among others, that the property being over Rs. 1000 in value should have been advertised in the *Gazette*, and that the decree-holder had himself bid for and been declared the purchaser without having first obtained the sanction of the court under section 272. The officer conducting the sales had not called upon the decree-holder to pay the purchase-money, but had allowed him credit for the same in reduction of the judgment-debt.

The district judge found the only irregularity to have been that a notice of sale had not been affixed to each separate parcel of land sold, but he held that no substantial injury had resulted therefrom, and accordingly dismissed the application.

The execution-debtor appealed.

Wendt, for the appellant, contended that there had been a material irregularity in the conduct of the sale, in that the execution creditor had been allowed to bid for and to purchase the lands and to obtain credit for the price in reduction of the judgment. A creditor so bidding possessed an advantage over outside bidders which was calculated to deter the latter from coming forward, and section 272 of the Code therefore required the previous sanction of the court, which may be "subject to terms as to credit being given by the fiscal and otherwise." In the absence of such terms the sale may be prejudiced. In *Piloris* v. *Don Bastian** this Court, reversing the order of the district court, had set aside a sale where the execution-creditor had without the court's sanction bid and purchased, although he had not obtained credit for the price but had competed on equal terms with outside bidders.

Dornhorst, (*Dias*, C.C., with him) for the decree-holder and the fiscal. There was no irregularity in permitting the creditor to bid. Section 272, unlike the corresponding section of the Indian Code (section 294), does not expressly forbid the creditor's purchasing without the court's sanction. It therefore does not take away his right to do so, which previously existed. In the case cited, the court found there had in fact been no sale, the creditor having been the only bidder. Even assuming an irregularity, there is no proof of damage consequent thereon.

Wendt, in reply.

Cur. adv. vult.

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* D. C. Kurunegala, No. 354—M 244. } PILORIS v. DON BASTIAN.

The facts material to the present report are sufficiently disclosed in the judgment of the court.

Dornhorst, for the execution-debtor, appellant.

Wendt (*Sampayo* with him) for the execution-creditor.

September 29, 1893, LAWRIE, J.—I would set aside the order and grant the application to set aside the sale. There was so great an irregularity in the conduct of the sale by the fiscal's officer that in law there was no sale at all. The decree-holder had not obtained the leave of court to bid, he was the only bidder—in other words, there were no bidders, because his bid ought not to have been received. It makes no difference that he pretended that he bid both for himself and for another man, whom he desired to be entered as joint purchaser. The fiscal ought to have returned the writ to the court with the report that the sale had not taken place on account of there having been no bidders in attendance.

The respondent to pay the cost of the application and of this appeal.

WITHERS, J., concurred.

On March 9, 1894, the following judgments were delivered :—

Lawrie, J.—By our common law a judgment-creditor was entitled to bid for and to purchase the property of his debtor when sold by the fiscal in execution. (Mathaeus *de Auct*. 1. 1. n. 4 and 10, quoted in 2 Burge p. 575.) This was recognised in the Rules and Orders July 11, 1840, and by the Ordinance No. 4 of 1867. The 58th section of that Ordinance provided that in all cases where the execution-creditor becomes the purchaser of immoveable property sold by a fiscal under an execution at his suit, whether the amount of purchase exceeds or is less than the judgment claim, no conveyance of the property can be made to the purchaser except under the authority of an order of the court out of which the execution issued. Burnside, C. J., (6 S. C. C. 162) said, "the object of the Ordinance would seem to be that the transaction under which the execution-creditor seeks to obtain a transfer to him of the debtor's property should be brought under the direct notice of the court in order that the court may be satisfied of and adjudicate upon its *bona fides*." It is thus clear that prior to the passing of the Code it was competent for every execution-creditor to bid, and for the fiscal to declare him the highest bidder, and that the fiscal could not give the creditor a transfer without the express order of the court. To permit a creditor to bid was therefore not an irregularity in conducting the sale.

The Ceylon Code (unlike the Indian Code, section 294) does not prohibit a decree holder from bidding. It is not easy to construe section 272, but I think it means that a decree holder must be treated as an ordinary bidder with respect to payment of the price, unless he has obtained the previous sanction of the court to bid and to have the purchase money set off against the debt. I do not find in the Code anything which makes the bidding of a decree-holder who has not obtained the court's sanction an irregularity in conducting a sale. The sale is not complete, the right and title of the judgment-debtor is not divested until confirmation by the court and the execution of the fiscal's conveyance. I do not doubt that a court has right to refuse to confirm a sale if (to use the words of Sir Bruce Burnside already quoted) it was not satisfied of the *bona fides* of the decree-holder who had purchased.

The other irregularity alleged—the want of sufficient publication did not cause substantial injury to the judgment-debtor. The price obtained may have been small—less than the lands had cost, or less than similar lands recently fetched when sold under more favorable circumstances, (but of that there is no proof), but such deterioration of value at judicial sales is almost inevitable and the fact that the price is small does not prove that there was irregularity in publishing and conducting the sale.

Withers, J —I also think that the appeal fails. I find section 272 of the Civil Procedure Code very difficult to understand, but I am not prepared to say that an execution-creditor bidding without leave of court in competition with others at a judicial auction of property seized under his writ is in itself a material irregularity in the conduct of a sale.

Whether it is or not, it is not shewn that the debtor was really prejudiced by the fact of his judgment-creditor being the highest bidder at the auction and becoming the purchaser. Whether the court will confirm the purchase by this execution-creditor of property sold under his writ without the sanction of the court accompanied or not by imposition of terms, is another matter with which we are not now concerned. The case pressed upon us by Mr. Wendt was the case of a sale being held when no one was present to bid but the execution-creditor himself, and we thought that to hold a sale at all in those circumstances was a pretence of sale which could not but be eminently prejudicial to the judgment-debtor in the very nature of things.

Affirmed.

———:o:———

Present :—Lawrie and Withers, JJ.

(*June* 5 *and* 22, 1894.)

D. C. Galle, No. 2,076. } Ungo Appu v. Babuwe.

Mortgage—Sale of mortgaged property pending mortgage—Subsequent sale under judgment on mortgage—First purchaser not joined—Title—Priority—Registration.

The owner of certain land mortgaged it in January 1882, and the mortgage was at once registered. In November 1882, the mortgagor's right, title and interest in the land were sold in execution of a simple money decree against him and purchased by defendant, who obtained a fiscal's conveyance dated April 1883, registered in May 1883, and entered into possession. The mortgagee, thereafter, in a suit to which defendant was not a party, obtained against the mortgagor a decree on his mortgage, and caused the fiscal to sell the land, when plaintiff became the purchaser, and obtained a fiscal's transfer dated September 1884, which was not registered.

In an action of ejectment by plaintiff against defendant—

Held, that defendant had the superior title

Action for declaration of title to an undivided one-sixth of certain land and for possession thereof.

One Babian, being the owner of an undivided one-third share of the land, mortgaged to one De Silva a half of that share by bond dated January 2, 1882, (registered on March 22, 1882). On July 14, 1882, the defendant obtained a simple money decree against Babian, in execution of which he caused the fiscal on November 24, 1882, to seize and sell the whole one-third share belonging to his execution-debtor. The defendant himself became the purchaser, and obtained a fiscal's conveyance dated April 23, 1883 (registered on May 22, 1883.) On August 21, 1883, De Silva obtained against his mortgagor Babian, in an action to realise the mortgage, a decree in the following terms:—"It is declared that plaintiff do recover from defendant the sum of Rs. 80 with interest thereon at 24 per cent per annum from January 2, 1882, until payment in full and costs of suit. The property specially mortgaged is declared bound and executable under this judgment. Bond cancelled." This decree was never registered. In execution of it the fiscal on March 20, 1884, sold the one-sixth share mortgaged, and plaintiff became the purchaser, obtaining from the fiscal a conveyance dated September 27, 1884, which was never registered. It made no reference to the mortgage or decree, but simply assigned the execution-debtor's right title and interest in the mortgaged property. The plaintiff alleged that he had entered into possession of his purchase in September 1886, and been ousted by defendant in February 1893. The defendant denied plaintiff's possession and the ouster, and pleaded that plaintiff's title under his execution-purchase was bad as against defendant, who had been no party to the mortgage suit though in possession under his prior purchase. There was evidence at the trial of such possession.

The district judge held that the competition as to title was between the two fiscal's conveyances, and that the defendant's conveyance, being prior in date to plaintiff's and also registered, prevailed over the latter. The district judge felt himself bound by the decision in *Arumogam* v. *Kanapathipulle*, 7 S. C. C. 120, and *Canavadippillai* v. *Veluppillai*, 8 S. C. C. 111, though his own opinion was in accordance with that of Burnside, C. J., the dissentient judge in the latter of these cases. The action was dismissed with costs.

The plaintiff appealed.

The case is reported on the question of title alone, though other points were argued and decided.

Dornhorst, for the appellant. The district judge's ruling as to title is wrong. He has found that defendant was in possession at the time when the mortgagee obtained his decree, but it is not shown he was in such possession when the mortgage action was commenced. Defendant was therefore not entitled to be made a party to that action; his mere paper title from the mortgagor did not give him that right (*Marimuttu* v. *Soysa* (*the Diklande case*) 8 S. C. C. 121); and the sale under the mortgage decree therefore divests him of any title he may have had. It is true that this Court recently decided that the holder of a transfer of the mortgagor's title was not bound by the mortgagee's decree if not made a party to the action (*Abeyagoonewardene* v. *Andrisappoo*, *ante* p. 71) but that decision was opposed to *Marimuttu* v. *Soysa* and to what was previously regarded as settled law, and I would respectfully ask that it be re-considered. In *the Diklande case*, Clarence, J. stated what up to that time was considered to be the law, viz. that a purchaser from a mortgagor subsequently to the mortgage, although by operation of law he took a title subject to the mortgage, could not be divested of that title, whether he was in physical possession of the land or not, by any action between mortgagor and mortgagee to which he was not himself a party. But this law was altered by the decision of the majority of the court (from which Clarence J. dissented) in *the Diklande case* to the effect that a mortgagee, in order to secure a clean title to a purchaser in execution, need only join in the mortgage suit his mortgagor's vendee when the latter had physical occupation of the land, and thus "touched the conscience of the mortgagee with knowledge or notice of the existence of a person other than the mortgagor having a right to redeem." This decision was ever afterwards followed, until the case of *Abeyagoonewardene* v. *Andrisappoo*, which has the effect of a reversion to the view of Clarence, J., the dissentient judge in *the Diklande case*. It is submitted, next, that plaintiff makes title under a mortgage registered prior to defendant's purchase, and is therefore entitled to refer back his purchase to the date of the mortgage and take the mortgagor's title as it then stood. This position was recognized in a long series of decisions; it was tacitly assumed throughout *the Diklande case*, and in *Canavadippillai* v. *Veluppillai* (8 S. C. C. at p. 113) Dias, J. expressly lays down:—"It was contended that the first defendant is entitled to have the benefit of the previous mortgage of 1880, and the answer to that contention is that that mortgage has never been registered, but, if it had been, the first defendant's conveyance, though registered after the plaintiff's deed, would be entitled to prevail, as the first defendant's title would

be derived from a deed duly registered before the plaintiff's deed." The judgment of CLARENCE, J. in the same case also supports this view. The effect of the sale in execution of the mortgage-decree, therefore, was to divest defendant of the interest he had acquired subject to the mortgage. If it were not so, a mortgage would cease to afford any security; for, after a mortgagee had investigated his mortgagor's title and taken the precaution of registering his mortgage, the mortgagor might convey away the property to a purchaser who need not enter into possession and who could abstain from registering his purchase. The mortgagee being unaware of this sale would not make the purchaser a party to the mortgage suit, and the purchaser could save his title by registering just before seizure under the mortgagee's writ, or even after the fiscal's sale but before the sale was confirmed by the court. The purchaser under the mortgagee's writ would, under these circumstances, acquire no title to the land as against the holder of the private transfer, and that being so, no one would care to buy in such a case. Hitherto, a purchaser under a registered primary mortgagee's writ was supposed to get the best possible title.

Wendt, for the defendant. There was evidence that when the mortgagee commenced his action to realise the mortgage, the defendant was in possession, and he was therefore entitled to be joined in that action, even on the footing of the decision of the majority of the court in *the Diklande case.* CLARENCE, J. there expounds the previously existing law, and the decision of the Court in favour of the change is not as strong an authority as it might otherwise have been, for the case was complicated by the contention that the conveyance set up in opposition to the prior registered mortgage was impugned as having been made *pendente lite,* and while the land was under seizure. The mortgagor's undoubted title to the land mortgaged—what is analogous to the "equity of redemption"—could be validly transferred by deed without possession being given with it, and the reason of the rule requiring the transferee to be joined is that he has the right to redeem—the right to keep the land upon paying the mortgage debt. Until there has been a "foreclosure" as against him, he cannot be turned out of the land. This, it is submitted, is the basis of the decision in *Abeyagoonewardene* v. *Andrisappoo.* As to the relation back of the execution-purchaser's title to the mortgage, one essential is that there should be a proper "mortgage decree," ascertaining the debt, the identity of the land, and the nature and extent of the encumbrance. In *Sinnan* v. *Nicholas* (9 S.C.C. at p. 94) CLARENCE, J. said;—"We have for many years acted upon the doctrine that a wide distinction exists between the position of a purchaser in execution of a mere money judgment and a purchaser in execution of a mortgagee's decree declaring the land specially bound and executable on the footing of the mortgage. In the latter case the purchaser takes the landowner's title as it stood at the date of the mortgage, in the former case he takes it only as it stood at the time of the seizure in execution." (As to form of decree, see *Neketta* v. *Hawadiya,* 4 S. C. C. 149.) The mortgage decree on which plaintiff relies is bad: it defines no obligation or encumbrance, names no parties and identifies no lands; and therefore the purchaser took merely (what indeed his conveyance gave him) the right title and interest of the mortgagor at the date of seizure, which was *nil.* As to the decision reported 8 S. C. C. 111, no case can be produced in which the holder of a registered transfer from the mortgagor was held to have been divested of what was admittedly a good title by a proceeding between mortgagor and mortgagee behind his back. The security of mortgages need be in no way affected by upholding defendant's contention. Where a mortgagee himself purchases under the mortgage decree, he would again sue the transferee and compel him to redeem or quit the land; and where the purchaser is an outsider, he takes the ordinary risks of an execution sale.

Dornhorst, in reply.

Cur. adv. vult.

On June 22, 1894, the following judgments were delivered :—

LAWRIE, J.—I think that the plaintiff has been hardly dealt with, and if it had been possible to have treated this as a Roman Dutch Law possessory action, in which the plaintiff prayed to be reinstated in the land which he had possessed for a year, and from which he had been dispossessed, otherwise than by process of law, less than a year before action, I should have been glad to have given him that remedy. But that is not asked. Perhaps, even if it had been asked, it would have been cruel to the plaintiff to have given it. *Frustra petis quod mox restituturus es.* The defendant has title to the land, the plaintiff has none. When the original owner of one-third of the land mortgaged one-sixth of it, he did not thereby lose his property rights. He remained the legal owner, and hence, when a little while afterwards a creditor of his seized and sold the owner's right title and interest in the one-third, the purchaser (the defendant), on getting and registering a transfer, acquired all the rights which the execution debtor had in the land. He became the legal owner of the land, part of which was burdened with a

mortgage. His rights as owner could be taken from him only by transfer executed by himself or by legal execution on writ for a judgment to which he was a party or privy. The plaintiff is a purchaser of the right title and interest of the original owner at a sale in execution subsequent to the purchase by the defendant. It is clear that that sale carried nothing, because the original owner was then divested of all right to the land. Neither a decree-holder nor a fiscal warrants the title of the debtor in the property sold in execution. Here the plaintiff, like many another purchaser at a fiscal's sale, made a little speculation. He bid seven rupees and took his chance whether the debtor whose right he purchased had or had not any right in the land. He had none, and the plaintiff has none.

[His lordship then dealt with points not material to this report, and proceeded as follows :—]

Lastly, our local Ordinances are imperative : no one shall acquire an interest in land except by written title or by ten ye rs' possession. The written title on which the plaintiffs found is void as against that of the defendant, which is prior in date and registration. The possession of the plaintiff is for much less than ten years. I would affirm with costs.

Withers, J.—The facts of the case are these : One Babian owned one-third of a certain land. On the 2nd January, 1882, he mortgaged half of his share therein, *i. e.* one sixth, to one de Silva who registered his security on the 22nd March, 1882.

On the 21st day of August 1883 de Silva in an action on the mortgage bond against Babian obtained, on default of his debtor's appearance, a judgment against Babian to pay the principal and interest secured by his mortgage bond and a decree purporting to be a mortgage decree. Babian's one-sixth share was judicially sold on the 20th March, 1884, to the plaintiff, who procured a fiscal's transfer on the 24th of September 1884. Subsequently to the mortgage to de Silva the defendant sued Babian for an ordinary money debt and recovered judgment against him before 14th July 1882, and on the following 24th of November 1882 he at the sale under his writ bought Babian's one-third share in the land and procured a fiscal's transfer on the 23rd of April, 1883, which he registered on the 22nd of the following month.

The defendant entered into possession of what he had bought immediately after his purchase. This is proved by plaintiff's own witnesses. Subsequently, in September 1886 or thereabout (see exhibit A), the defendant received a letter from the plaintiff's proctor demanding that his client be let into one-half of the premises which had formerly belonged to Babian as a purchaser under a mortgage decree founded on a registered mortgage of Babian granted to the mortgage-decreeholder in 1882. It was represented to the defendant that the plaintiff had in consequence a better title than defendant himself to half of Babian's one-third. The defendant complied with this demand and gave half to the plaintiff—a separate half, as it would appear, for after six or seven years of peaceable tenure a sooria tree on the limit of the defendant's own property fell down and defendant, who had the tree sold, gave the other shareholders of the land on the limit of which the tree grew, other than plaintiff, their due quota of the proceeds. Plaintiff complained and was then turned out altogether.

There can be little doubt that defendant had purchased Babian's one-third share before plaintiff's mortgage action had been commenced, and indeed had taken possession of it before that. In the view I take of the facts, even Mr. Dornhorst would admit that to bind the present defendant by a mortgage decree against Babian's one-sixth it was necessary for the execution-creditor, under whom present plaintiff bought the one-sixth, to join the defendant in his mortgage action. On the general question of priority of title, I content myself with saying that as at present advised I hold to my recent opinion expressed in the case of *Abeyagoonewardene* v. *Andris Appoo*, which Mr. Dornhorst invited me to re-consider. When, however, a proper case comes before us in appeal, I shall listen with the greatest care and attention to every argument directed against it. I give no opinion as to the point raised by Mr. Wendt, that plaintiff's execution-creditor's decree was not a mortgage decree, but in effect a common money decree, but in this case it makes no matter whether it was or was not a valid mortgage decree, and I consider it unnecessary to adjudicate the point which was made by Mr. Wendt.

[His lordship then dealt with points not material to this report.]

Affirmed.

———:o:———

Present :—Lawrie and Withers, JJ.

(*May* 4 *and* 8, 1894.)

D. C. Kandy, No. 6,974. } Banda v. Budharakketa Unnanse.

Buddhist Temporalities Ordinance—Trustee—Member of Committee—Election—Residence— Qualification "to be elected or to serve"—Ordinance No. 3 of 1889, sections 4, 7, 8, 17, 39, 40.

Section 17 of the Buddhist Temporalities Ordinance, No. 3 of 1889, enacts that no person, who does not possess the qualifications described in section 8 of the Ordinance, shall be competent "either to be elected or to serve as trustee."

Under section 8 of the Ordinance a person, among other qualifications, "must have been the occupier of "a house within the district either as owner or tenant "for one year previously to the date of his election."

Held that under the above enactments, where a person had the necessary qualification as to residence at the time of his election as trustee, it is not necessary, in order to serve as such trustee, that he should continue to reside within the district, and he does not cease to be trustee by reason of change of residence during service.

The plaintiff as trustee of the Dambulla Vihara brought this action against 15 defendants, complaining that the defendants had taken and removed certain offerings of the temple on May 20, 1893. the action being instituted on June 2, 1893. The defendants, among other things, denied that at those dates the plaintiff was trustee of the temple, relying on the fact that he was no longer an occupier of a house within the district in which the temple was situated.

The Dambulla Vihara is situated in Dambulla, which under the Proclamation of November 15, 1889, issued under section 4 of the Buddhist Temporalities Ordinance (*Government Gazette*, November 15, 1889) was a district of the Province of Kandy and comprised the sub-district of Kiralawa Korale. The plaintiff, who then had occupied and continued to occupy a house in Kiralawa Korale, was elected trustee of Dambulla Vihara on September 2, 1890, and received an act of appointment dated July 11, 1891. But by Proclamation of August 26, 1892, (*Government Gazette*, August 26, 1892) the limits of the Provinces of Kandy and Anuradhapura were defined and Kiralawa Korale was transferred from the Province of Kandy to the Province of Anuradhapura and was made a sub-district of Kolagampalata. Thus, after this last Proclamation, the plaintiff ceased to occupy a house in the district of Dambulla in which the temple in question is situated.

The learned district judge considered that by reason of the words "or to serve as trustee" in section 17 of the Ordinance it was necessary not only that a trustee should be resident in the district at the time of election but that he should continue to so reside and that otherwise he ceased to be trustee. He accordingly held that the plaintiff was not trustee at the date of the acts complained of or at the date of the action, which he therefore dismissed. The plaintiff appealed.

Sampayo, for the appellant.

Dornhorst, for the first defendant.

Wendt, for the second, third and from the seventh to the fourteenth defendants.

Seneviratne, for the other defendants.

Cur. adv. vult.

On May 8, 1894, the following judgments were delivered :—

Lawrie, J.—I am unable to agree with the construction put by the learned judge on the 8th section of the Buddhist Temporalities Ordinance. That section enacted that no one can be elected or can serve as a trustee of a temple unless he has been the occupier of a house within the district either as owner or tenant for one year previously to the date of his election. It is admitted that the plaintiff did possess that qualification.

Nothing which has occurred subsequently can touch that qualification. It is not enacted that after the election the trustee must continue to occupy a house within the district. It is sufficient that he occupied a house for a year previously to his election.

The dismissal of the action must be set aside with costs of this appeal, and case sent back for judgment on the merits.

Withers, J.—The only question argued before us in the case was whether in the months of May and June, 1893, the plaintiff was a trustee of the Vihare under the Buddhist Temporalities Ordinance.

It is found as a fact by the learned judge that at the date of his election to the office of trustee the plaintiff possessed the qualification described in section 8 of the said Ordinance (No. 3 of 1889) viz., that of having been the occupier of a house within the district either as owner or tenant for one year previously to the date of his election. No one gainsays that fact. But because at those dates the residential district of the plaintiff had been transferred by Government from the province of Kandy to that of Anuradhapura, the learned judge holds that the plaintiff had become disqualified to hold the office of trustee. He bases his ruling on the words of section 17 of the Ordinance "No person who does not possess this amongst other qualifications shall be competent either to be elected or to serve" and by the latter words "or to

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serve" he understands a qualification of continuous residence during service within the district of those competent to elect a trustee for this particular Vihara. I venture to think that this interpretation of the Ordinance is a mistaken one.

By section 39 every person who once accepts the office of trustee shall be bound to act as such trustee. He may resign, and in that case or in the case of his death or departure from the Island, bankruptcy, incapacity etc., section 40 provides for the temporary appointment of a trustee pending the election of a successor. A provisional trustee, according to this section, has all the powers and duties of a formally elected trustee and there is no doubt that no person could be appointed to serve as such provisional trustee who did not possess the qualification of district residence for one year before his appointment to serve as trustee. As long as he is in the Island a trustee is bound to perform the duties of his office.

For these reasons I think the learned judge's judgment dismissing the action must be set aside and the case sent back to be proceeded with in due course.

Set aside with costs accordingly.

Set aside.

———:o:———

Present:—Lawrie and Withers, JJ.

(*May* 22 *and* 29, 1894.)

D. C. Badulla, No. 661. } Appuhamy v. Kiri Menika.

Kandyan law—Deed of gift—Gift by husband to wife —Disinherison of children.

In a deed of gift under the Kandyan Law, a clause of disinherison is not necessary where the gift is by a husband to his wife, no where it does not embrace all the *paraveni* lands of the donor.

The plaintiffs alleging that they were the children and sole heirs of one Hamy deceased and entitled to certain lands by inheritance and by prescriptive possession sued the defendant in ejectment. The defendant denied plaintiffs' title and possession and pleaded *inter alia* that Hamy had by a deed of gift dated July 20, 1876, gifted the lands in question to his wife Ran Menika and that Ran Menika having possessed the lands under the said gift conveyed the same to defendant by deed dated December 29, 1884, and she claimed to be entitled to the lands under this conveyance and by prescription. The plaintiffs in a replication admitted the deed of gift by Hamy but raised a question as to its validity on the ground that it did not expressly disinherit his children the plaintiffs or set forth the reasons for such disinherison.

The district judge held the deed of gift by Hamy to be invalid on the ground stated by the plaintiffs and he relied for his decision on the judgment of the Supreme Court in *D. C. Kandy* No. 69,454,* and judgment was thereupon entered for plaintiffs.

The defendant appealed.

Sampayo, for the appellant. It is not necessary that heirs should be expressly disinherited in the case of a gift from a husband to wife. *C. R. Matale* No. 1955, Leg. Misc (1866) p. 78. Neither is it necessary when a portion only of the donor's property is gifted away. *D. C. Kandy* No. 37916, Leg. Misc. (1866) p. 75. And there is no proof, which it was incumbent on the plaintiffs to furnish, that all the property of the donor was included in the deed.

Wendt, for the plaintiffs. It is submitted that the weight of decisions is against the appellant. Where the donation is by deed *de presenti*, the heirs of the donor must be expressly disinherited. *D. C. Kandy* No. 69,454, cited by the district judge. See also *D. C. Kandy* No. 27,150, Austin p. 192. There is no distinction arising out of the fact of a donor gifting only a portion of his property, and even if so, it is

* *Present*:—Phear, C. J. and Dias, J.

(*April* 5 *and* 16, 1878.)

D. C. Kandy, No. 69,454. } Sundara vs. Peris.

Cayley, Q. A. for appellant.

Dornhorst, for respondent.

Cur. adv. vult.

Phear, C. J.—In this case the principal question which we have to decide is whether or not the deed which forms the root of the defendants' title is by law operative against the heirs of the person who made it, and we have been referred to three decisions of this Court, namely, the decision in case No. 27150 Kandy, dated 19th November 1856, that in case No. 34395 Kandy, dated 7th November 1861, [since reported, Ram. (1860-62) 108] and that in case No. 56397 Kandy, dated 3rd December 1874, which, it is argued, have the effect of rendering the question a *res adjudicata* adversely to the claim of the defendants. Now these decisions appear undoubtedly to be authoritative applications of the law, which we have to follow. to documents which no doubt have a considerable resemblance in character to that now in question; and so far therefore as these decisions serve to lay down or to recognise that law, they are valuable. But each document must stand or fall by its own merits; and we are not now much concerned to inquire whether the application of the law in each of these three instances was entirely happy, provided there be no obscurity left as to the Court's view of the actual law itself. And as to this, fortunately, there seems to be no doubt whatever. So far as is material for the purpose of this suit, the law may be concisely stated as follows:—

A Kandyan, as well as any other person in the Colony, may by will make any disposition which he thinks fit

for the appellant who sets up the distinction to establish the fact, of which however there is no proof.

Cur. adv. vult.

On May 29, 1894, the following judgment was delivered :—

Lawrie, J.—I conceive that the history and the reason of the necessity of a distinct statement in a deed of gift that the donor disinherited his heirs was this, that in Kandyan times almost all land was held subject to and on condition of the performance of onerous services which as a rule would be performed only by men in the prime of life. The young and the old infirm men, and women, could not do the work for the service required by the king and the dissawe, and if their work was not done, the land was taken from them and given to others who could do it.

Hence, it was common for men to give deeds of gift on condition that the donee should perform the service and would support and maintain the donor. Such deeds of gift were always revocable, and were revoked whenever the donee proved ungrateful and when he too ceased to do service, or when the donor himself recovered strength. It is evident that the deed for assistance to be rendered to, or for, a donor, was not presumed to be intended to prejudice his heirs. On the donor's death his heirs succeeded and they in their turn performed service or found substitutes. But the Kandyan law recognised the right of a land-owner to disinherit his heirs for a sufficient cause, provided he did so with formalities which shewed that the disinheriting was not done hastily and in the height of passion to affect heirs. It was necessary that a gift should contain or be accompanied by clear words disinheriting and giving a good reason for this exclusion.

In these days when *rajakariya* to the Crown is abolished and when services are due only to temples and to Nindegama owners, and whenever these are commutable, the necessity for finding substitutes for the old and infirm does not exist, and the Kandyan law which enforced the utterance of clear words of disherison and a statement of the reasons is really obsolete and I am not prepared to apply it except to cases identical with those in which in past times it has been applied by this Court.

I am of opinion that the plaintiffs have not shewn cause why the deed of gift by their father executed so long ago as 1876 in favor of the donor's wife should be held to be invalid.

The plaintiffs put the case badly. They averred that they were entitled to these lands as the sole heirs of Hamy their father, but it is now admitted that the defendant is their sister.

The plaintiffs have not averred that their father had no other lands than those he gifted in 1876, for aught that appears the plaintiffs succeeded to a fair share of their father's lands on his death. A clause

of his property to take effect after his death, and such disposition will be operative against, and will override, all claims to the property by inheritance through him (clauses 1 and 21 of Ordinance No. 21 of 1844).

A Kandyan may also by contract for valuable consideration or by gift make an equally extensive disposition of his property to take effect during his life, only that in the case of a gift, the gift is revocable by the donor, at his option, at any time, notwithstanding subsisting enjoyment under it by the donee; and further that if the gift embraces the entirety of the donor's property it will not be presumed to have been intended by the donor, though unrevoked by him at the time of his death and in terms professing to pass an absolute interest, to continue afterwards operative as against the heirs (inasmuch as this would have the effect of disinheriting them) unless the instrument of gift itself expressly by a clause of disinherison says that it is to be so, and gives the reason for it.

This latter proposition appears to have been for the first time authoritatively laid down by the Supreme Court in case No 27150 Kandy, reported in Austin p 192. In that case the deed in question purported to make an immediate gift of the whole of the lands of the donor to his brother to take effect in possession at once, and actual enjoyment appears to have been had under it from the date of the deed until after the donor's death, which seemingly did not occur for some years. The deed was in no degree testamentary in character, and the District Court based its decision upon this circumstance.

The proposition was again approved of and acted upon by the Supreme Court in the decision passed on 7th November 1861 in case No. 34395 Kandy, where the document to which it applied was somewhat ambiguous in its terms, and there was some doubt upon its wording, whether the gift was to take effect in possession and enjoyment upon execution of the deed during the life of the donor or only after his death. The Supreme Court held that the gift was of the first class and that consequently the proposition of law above stated must be applied to it.

The third decision to which we have been referred is that passed on the 3rd December 1874, in case No. 56397 D. C. Kandy. In that case, also, the primary question was, whether or not, upon the words of the document, the instrument was a deed of present gift or a will, and the Supreme Court held (without any discussion of the phraseology) that the instrument was not a will but a deed of gift, and that being so, it recognised and applied the law of the previous decisions relative to the necessity of a clause of disinherison in order to enable an absolute gift of an entire property, which had taken effect against the donor, to continue operative after his death as against his heirs.

If, therefore, for a moment, we confine our attention to the alternative of a voluntary conveyance, we see that a Kandyan proprietor can defeat his heirs either by making a gift which takes effect in his life time, and continues to have effect after his death, or by making a gift which shall first take effect after his death, only that the machinery in the first case must be somewhat more complicated than in the second. And the question before us reduces itself to this, namely, whether the deceased Vel Duraya in making the deed of 27th February 1875, which is admitted to be his deed, used apt means of either sort for this purpose.

of disherison was necessary only when all the *paraveni* lands were gifted.

But what distinguishes this case from any other reported is that he donee was the donor's wife, and if I am not mistaken she was the mother of the plaintiffs. I know of no case in which a deed of gift by a man to his wife was held invalid because he did not disinherit their children.

I am therefore unable to affirm the judgment. The case must go back for trial of the other issues raised—the issue of prescriptive possession and the issue whether Ran Menika the donee under the deed of 1876 did or did not execute the deed of 1884.

The defendant must get the costs of the day of trial in the district court and of this appeal. Other costs should, I think, abide the final result.

WITHERS, J. agreed.

Set aside.

———:o:———

Present :—WITHERS, J.

(*August* 9 *and* 21, 1894.)

P. C. Colombo, No. 31,394. } SPICER v. VAYIYAPU[illegible]I.

Merchandise Marks Ordinance—Fraudulent marks —Prosecution—Police Court—District Court—Election—Jurisdiction—Ordinance No. 13 *of* 1888, *section* 3 *subsection* 5.

In a prosecution under section 3 of the Merchandise Marks Ordinance, 1888, the police magistrate is *functus officio* the moment the accused elects to be tried by the district court.

The plaint preferred against the defendant was under section 3 subsections (*b*) and (*d*) of the Ordinance No. 13 of 1888 of applying to certain cigars the trade mark of Messrs. Spencer & Co., and of applying to the said cigars the false trade description of Beaconsfield cigars of Messrs. Spencer & Co.

On the day of trial, after the particulars of the offence were explained to the defendant, he was informed of his right to be tried by the district court. The defendant elected the district court. The police magistrate, thereupon, proceeded to take proceedings under chapter xvi of the Criminal Procedure Code. After the case for the prosecution was closed, the police magistrate held that no case was made out against the defendant and accordingly discharged him.

The complainant appealed.

Dornhorst, for the appellant.

Bawa, for the defendant.

Cur. adv. vult.

On August 21, 1894, the following judgment was delivered :—

WITHERS, J.—A complaint was laid before the police magistrate desiring that the respondent should be charged with certain offences under the Ordinance

The document itself runs as follows :—

" Know all men by these presents that whereas I Rantilekedurayalagedera Hattena VelDuraya of Polmalegama in Dolosbage of Ganhelle Korale of Udapalate in the Central Province of the Island of Ceylon am at present about 60 years of age and whereas I am at present affected with dysentery since a fortnight, whilst I am in my good sense and memory, the following lands &c. are given over and granted by way of gift unto my lawful wife Gawilipitia Singhalapedigedera Garro of four Korales and residing at Polmalegama aforesaid with my good will and pleasure, as she has been rendering me every comfortable assistance for about 40 years past, that she may possess the same for ever in paraveni [here are set out the parcels] all these high and low lands, houses, gardens and plantations and everything valued at Rs. 491 currency f Ceylon are hereby made over and granted by way of gift unto the said Singhalap digedera Garro. Therefore the said Garro shall during my natural life render me every comfortable assistance and after my death she shall bury my remains properly according to the customs of the country and perform and observe the meritorious acts and almsgiving according to the rites of the religion after my death, and thereafter the s id high and low lands, houses, gardens and plantations the said Garro and her heirs shall possess undisturbedly for ever or do whatever they please, and it is hereby appointed that from henceforth none of the other heirs or assigns of me the said Hattena VelDuraya shall have any power or claim to and in the said high and low lands, houses, gardens and plantations. And having caused this deed of gift to be written I the said Hattena VelDuraya have set my signature and seal to three of the same tenor as these presents and granted at Rantilekedurayalagedera in Polmalegama on the 27th day of February 1875."

In terms this deed, read as a whole, plainly, we think, constitutes a gift which is first to take place after the death of the donor. The consideration mentioned in it is merely the motive and expectation which led to the gift being made and is not the subject of any stipulation or contract entered into by the donee. The disposition of the property effected by the deed, although designated as a gift, is solely testamentary in its character, and must by force of the words of Ordinance 21 of 1844 have operation given to it (see interpretation clause no. 21). Even if the document be upon any artificial ground classed as a gift *inter vivos*, still it passes no present interest and is at most a gift which is to take effect *in futuro* after the donor's death It is directed solely against the donor's heirs, and there can be no doubt that the donor intended to displace them It is not in the predicament of a gift of an absolute interest under which there has been actual enjoyment before the donor's death, and in reference to which there is a question whether the donor intended that gift and enjoyment to continue after his death to the disinheriting of his heirs, which was the case of the leading precedent No. 27150, Kandy.

It seems to us, therefore, that in this case the defendants ought to succeed.

No. 13 of 1888. The respondent was summoned to answer charges of two offences.

On his appearance he was informed of his right to be tried by the district court as well as by the court which had summoned him. He accordingly required to be tried by the district court. The magistrate thereupon proceeded to enquire into the charges with the view, I presume, of committing the accused before the district court to stand his trial there, if, in his opinion, those charges were made out. After prosecuting an enquiry, he came to the conclusion that no case had been made out against the respondent and he discharged him.

It is from this order of discharge that the complainant has taken an appeal and the question for me to decide is whether the procedure adopted by the magistrate was right in the circumstances. If it was, I certainly should refuse to interfere with the order.

In my opinion, however, the magistrate was *functus officio* the moment the accused required to be tried by the district court. In regard to offences under the Ordinance No. 13 of 1888 the police court has concurrent jurisdiction with the district court, though its punitive powers are not so great. Yet the Ordinance permits a person, summoned by the police court to answer a charge under it, to elect to be tried by the district court. The Ordinance does not say what course the magistrate should pursue if the party accused requires to be tried by the district court. It is not like the case where an accused may consent in certain circumstances to be tried by the police court for an offence otherwise triable by a superior court alone. There, but for the consent of the accused, the magistrate would he bound to prosecute the enquiry in order to the committal of the accused to a higher court, if ultimately so advised.

This Ordinance gives the police court original jurisdiction to try an offence against its provisions, only it is not to exercise it, if the accused requires to be tried by a district court.

In my opinion the police magistrate had no jurisdiction to conduct an enquiry into the charges when once the accused had required to be tried by the district court. A cautious and perhaps prudent course would have been to communicate the fact of the charge and the requirement of the accused to be tried on it in the district court to the Attorney-General for his information and guidance. Anyhow it appears to be my duty to quash the proceedings subsequent to the recorded election of the respondent, and that is the only order I shall make.

Proceedings quashed.

Present:—Bonser, C. J. and Withers, J,

(*July* 10 *and* 11, 1894.)

D. C. Kandy. No. 6,620. } Habibu Lebbe v. Punchi Ettena.

Practice—Trial—One proctor appearing for another—Authority—Appearance of parties—Absence of parties - Civil Procedure Code, sections 24, 25, 27, 72 *and* 84.

The appearance of a proctor for the duly appointed proctor of a party is not an appearance of the party within the meaning of section 24 of the Civil Procedure Code.

Where, therefore, at the trial of an action, both the plaintiff and his proctor were absent and another proctor appearing for the plaintiff's proctor applied for a postponement, which being disallowed a final decree of dismissal of the action was entered—

Held, that there was a default of appearance of the plaintiff and that the proper course was not to dismiss the action absolutely but to enter a decree *nisi* under the provisions of section 84 of the Code.

This was an appeal from the refusal of the district judge to set aside a decree dismissing plaintiff's action with costs. On the day of trial, October 25, 1893, Mr. Gunetilleke on behalf of Mr. Beven, proctor for the plaintiff, moved for a postponement of the trial on the ground of the absence of the plaintiff and all her witnesses. This motion was opposed. The learned district judge refused to grant the postponement, and as no evidence was called for the plaintiff he dismissed the action. Thereafter, on November 10, 1893, Mr. Beven filed an affidavit from the plaintiff and moved that the order of dismissal be set aside. The district judge disallowed the motion, holding that the plaintiff was represented on the day of trial by Mr. Gunetilleke, who appeared on behalf of Mr. Beven, and that the order dismissing the action was consequently made *inter partes.*

Against this order the plaintiff appealed.

Dornhorst, for the appellant.

Seneviratne, for the defendant.

Cur. adv. vult.

On July 11, 1894, the following judgments were delivered :—

Bonser, C. J.—This is an appeal from a refusal of Mr. de Saram, district judge of Kandy, to discharge an order which he had made, dismissing the plaintiff's action with costs.

What happened was this. On the day of trial the plaintiff was absent and his proctor was absent; but his proctor being unable to be present had asked

another proctor to mention the matter to the judge, and to ask for a postponement because of the absence of the plaintiff and his witnesses. The judge had the names of the witnesses called, and some of them answering to their names, he considered that he had been deceived, and dismissed the plaintiff's action with costs. On a subsequent day the plaintiff made an application by his proctor that the judgment might be set aside on the ground that it was given in his absence, and that the action might be tried. That application was refused by the judge for these reasons:—"The motion is refused. If the decree "dismissing the action is erroneous, I cannot assume "to myself the powers of the Supreme Court and "set it aside. It must stand until set aside by that "Court. I am, however, of opinion the decree is "not erroneous. On the day fixed for the hearing "of the action the plaintiff was represented by Mr. "Gunetilleke who appeared on behalf of Mr. Beven "proctor for the plaintiff. Section 84, which enacts "the procedure on the non-appearance of the plain- "tiff—and that, I take it, is either of the plaintiff "himself, or of his proctor—is inapplicable to this "case."

From that refusal this appeal is taken. It will be seen that there are two grounds alleged by the judge for refusing the motion,—first, that he had no power to deal with his judgment, whether that judgment was erroneous or not, and secondly that the judgment was not erroneous. With regard to the first point as to the power of the judge to deal with a judgment given in the absence of one of the parties, I am informed by my learned brother that it has long been the practice, and a practice which has been expressly approved by this Court, that, in cases like the present one, application should be made in the first instance to the court which pronounced the judgment, and if the court which pronounced the judgment refuses to set it aside, then and then only should there be an appeal from that refusal. That course appears to me to be a most convenient one, and furthermore it is in accordance with the practice of the Appeal Court in England. It has been laid down that although the court of appeal may have jurisdiction to hear appeals from judgments given by default, yet that it is not desirable to exercise that power, and to encourage appeals to be brought before the case has been tried (see *Vint* v. *Hudspith*, 29 Ch. D. 322). Therefore, if the judgment was given in the absence of one of the parties, I think that under the practice laid down by this Court, it was competent for the district judge to deal with the case, and that the plaintiff adopted the proper course in applying first to the district judge before coming to this Court.

Then, the question arises, was this a judgment given in the absence of one of the parties? That depends on the answer to the question whether Mr. Gunetilleke represented the plaintiff. Now, it appears that Mr. Gunetilleke had no direct authority from the plaintiff. He is stated by the judge to have appeared on behalf of Mr. Beven who was the plaintiff's proctor. Section 72 of the Civil Procedure Code explains what is meant by an appearance in court. The explanation there given is this:— "A party appears in court when he is there pre- "sent in person to conduct his case, or is repre- "sented there by a proctor or other duly authorised "person."

Section 24 provides that any appearance, application, or act, in or to any court may be made by the party in person or by his recognised agent, or by a proctor duly appointed by the party or such agent to act on behalf of such party.

Now, the application made by Mr. Gunetilleke was not made by a party in person. It was not made by a recognised agent, for he does not come within the definition of a recognized agent given in section 25 of the Civil Procedure Code; nor was he a proctor duly authorised by the plaintiff. It is provided by section 24 that an advocate instructed by a proctor represents the proctor in court; that is, that where an application is made by an advocate instructed by a proctor, it is the same thing as if the proctor made the application in person. Mr. Gunetilleke is not an advocate and I am of opinion that under the Code it is not competent for a proctor to instruct another proctor to appear for him to make an application in court, and therefore it appears to me that the plaintiff not being there in person, and not being there in the person of his proctor, was not there at all. Moreover, it is quite clear that Mr. Gunetilleke had no authority to conduct the case. All that he was authorised to do by the proctor was to bring to the notice of the court that the plaintiff and his witnesses and proctor were not there, and to ask for a postponement. It seems to me that the district judge ought not to have made an order dismissing the action but that he ought to have made an order *nisi* under section 84 which provides for the case of the plaintiff's non-appearance at the trial.

I think the proper order will be to set aside the judgment and to order a new trial; but as the difficulty has been occasioned in a great measure by the conduct of the plaintiff, I do not think he should have the costs of the appeal, and it will be a condition of the judgment being set aside that the plaintiff do pay the defendants the costs occasioned by his non-appearance at the trial, and the costs of the application to discharge the order.

Withers, J.—I agree. The district judge appears to have thought that Mr. Gunetilleke represented the plaintiff when he appeared before the court on the day of trial to apply for a postponement. If that had really been the case, his judgment of dismissal would have been a final order *inter partes* which could only have been reviewed by this Court.

The district judge, however, was wrong in regarding Mr. Gunetilleke as being authorised to appear for the plaintiff. The plaintiff was present neither in person nor by proctor. The judgment which is one of dismissal is an *exparte* one. It is very possible that we may have power to entertain an appeal from a judgment pronounced under such circumstances. The proper course according to the unvarying practice of this Court has been for the party aggrieved by an *exparte* order or judgment to apply to the court of first instance for its discharge and only on that application being refused to appeal to this Court.

My Lord the Chief Justice has called my attention to section 27 of the Code which seems to be in point in this matter. This section enacts that the appointment of a proctor to make any appearance or application or do any act as aforesaid shall be in writing signed by the client and shall be filed in court.

Set aside.

:o:

Present:—Bonser, C. J., Lawrie and Withers, JJ.

(*July* 3, 13, 18, 19, *and August* 28, 1894.)

D. C. Galle, No. 2,205. | The Government Agent v. Hendrick Hamy.

Title to land—Mortgage—Competition between purchaser under ordinary decree and subsequent purchaser under mortgage decree—Mortgage decree, requisites of—Registration—Land Acquisition—Ordinances No. 8 *of* 1863, *section* 39, *and No.* 14 *of* 1891, *section* 17.

In 1877 the owner of certain land mortgaged it by an instrument duly registered. The mortgagee in 1882 obtained a mortgage decree (unregistered) but execution was not enforced until 1893, when the land was purchased by appellant, who registered his conveyance in November, 1893 Meanwhile, in 1890, the land was sold in execution of an ordinary money decree against the mortgagor and purchased by the respondents, whose conveyance was registered on March 3, 1892.

In a contest as to title to the land between appellant and respondents—

Held, that the appellant could not refer his purchase back to the mortgage so as to gain priority over the intervening conveyance to respondents, because the mortgage was merged in the mortgage decree, and the competition therefore lay between the mortgage decree, declaring the land executable for the judgment debt, and the conveyance of the land to the respondents, which was not expressly subject to that debt; and that the decree, being unregistered, was void as against the registered conveyance.

Per Lawrie, J.—A mortgage decree, in order to affect subsequent purchasers, should be as specific as the mortgage of which it comes in place. It should specify and describe the property declared executable so as to identify it with reasonable certainty The present decree was ineffectual for not complying with these requisites.

Even if the mortgage decree were valid as against the respondents, they had, before it was enforced, become the lawful owners of the land by a registered conveyance, and in view of the long lapse of time between decree and execution, they were entitled to notice before the land c uld be sold over their heads.

Land Acquisition.

The land was acquired by the Government on July 13, 1893. The parties appearing before the Government Agent were agreed as to the value of the land, but differed among themselves as to their respective shares. The Government Agent referred the matter to the district court in terms of section 11 of the Land Acquisition Ordinance, No. 3 of 1876. Upon the claimants stating their several claims to the court, (which they did in writing on October 3 and 4, 1893) a contest arose between the first and second claimants on the one hand and the fifth claimant on the other, each party claiming the entirety of the soil and one-half of the plantations, by devolution of title from the fourth claimant who had been the original proprietor. The first and second claimants based their claim on a fiscal's sale to them, on July 12, 1890, in execution of an ordinary money-decree against fourth claimant, their fiscal's transfer being dated August 4, 1891, and registered on March 3, 1892. The fifth claimant relied on a sale in execution against fourth claimant upon a mortgage dated June 29, 1877, and registered on July 4, 1877. The mortgagee, on September 22, 1882, obtained a decree against his mortgagor which was never registered, but which he assigned to fifth claimant, who on January 8, 1892, was substituted plaintiff in the room of his assignor, and execution was allowed for the amount of the decree. Execution was issued on March 21, 1892, and the land was sold on April 10, 1893, to fifth claimant himself, who obtained a fiscal's transfer on November 6, and registered it on November 7, 1893.

The district judge held that the rights of parties must be ascertained as at the date of acquisition of the land (July 13, 1893) at which date the fifth claimant had no title; and also that (for reasons given by him in *Ungo Appu* v. *Babuwe*, reported *ante* p. 76) the fifth claimant could not refer back his purchase to his registered mortgage of 1877 so as to acquire priority over first and second claimants' title.

The fifth claimant appealed.

The case was first argued, on July 3 and 13, before Bonser, C. J. and Withers, J., and was fur-

ther argued, on July 18 and 19, before the Full Court. The CHIEF JUSTICE left the Island on furlough before judgment was delivered, LAWRIE J. being appointed to act as Chief Justice.

Dornhorst, (*Sampayo* with him) for the appellant. The district judge was wrong in holding that appellant could not take advantage of the registered mortgage, under which he bought, to give his title priority over respondents'. It was well-settled law that he could, until the recent decisions of *Abeyagoonewardene* v. *Andrisappoo* (*ante* p. 71) and *Ungo Appu* v. *Babuwe* (*ante* p. 76). In *Canavadippillai* v. *Veluppillai* (8 S.C.C. 111) DIAS, J. expressly says (what was in fact the *ratio decidendi*) that had the mortgage under which the second execution sale took place been registered, that sale would have prevailed over the first, in spite of its priority of registration. (See also *Alia Markar* v. *Uduma Lebbe*, *D. C. Galle* No. 52,692, Civ. Min. December 17, 1886.) [LAWRIE, J.—But that would only be where you have made the first purchaser a party to the mortgage action.] Then the present contest would never arise, for the first purchaser would be estopped by the decree. Besides, there was no such qualification in the doctrine laid down in the case just cited. Even were such joinder necessary, it does not apply to the present case, for the mortgage decree was duly obtained against the mortgagor long before the respondents acquired any interest whatever in the land, and they took the land burdened with the decree. [BONSER, C. J.—If your decree affected the land, it ought to have been registered. Not being registered, it is void as against respondents' registered conveyance, and as you trace your title through the decree, your title fails in competition with theirs.] It is submitted, it has never been ruled that registration of a mortgage decree is necessary. Such a decree is a decree *in rem* (3 Burge, Col. and For. Laws, 161.) and binds the property into whosesoever hands it may pass. When the land is sold under such a decree, the purchaser's title relates back to the mortgage; just as, in the ordinary case of an execution sale, the fiscal's conveyance relates back to the date of sale. (*Abubakker* v *Kalu Ettena*, 9 S. C. C. 32.) [WITHERS, J. referred to *Silva* v. *Tissera*, 9 S. C. C. 92; *Selohamy* v. *Raphiel*, 1 S. C. R. 73. BONSER, C. J.—Is that not a reason why the mortgage decree should be registered? Otherwise you might have a mortgage decree and a sale under it, and keep your fiscal's conveyance in your pocket for 20 years, and then register it and contend that it squeezes out all title to the land acquired by innocent intervening purchasers. LAWRIE, J.—It squeezed out a lessee in *Silva* v. *Tissera*.] Unless it has that effect, there is no value in a registered mortgage. [WITHERS, J.—You may sue in a new action to enforce the mortgage as against the purchasers under the money decree.] That would only be possible where the mortgagee himself purchases, not where an outsider buys; and if that be the position of an outside purchaser, no one will care to buy, any more than he cares to buy under an ordinary money decree where the debtor's interest is sold with all its encumbrances. [LAWRIE, J. That was done in *Arumogam* v. *Valuppillai*, 9 S. C. C. 97.] There no sale under the mortgagee's writ had yet taken place. Another ground for appellant's claim is that since the Civil Procedure Code came into operation the fiscal sells the land itself, and not merely the right, title and interest of the debtor (section 289, Form 56). Appellant has therefore a registered conveyance of the land itself, while respondents have only the debtor's interest therein, which was subject to the mortgage and the decree. [BONSER, C. J.—But the sale is confirmed only as between parties to the suit and the purchaser (section 283) and does not affect third parties.] As to the district judge's ruling that the title must be settled as at the date of acquisition, it is submitted that the date of adjudication by the court is the date that must be regarded. (Ordinance No. 3 of 1876, section 21.) Appellant's fiscal's conveyance, once obtained, relates back to the auction sale (*Abubakker* v. *Kalu Ettena*, *ubi supra*.) [LAWRIE, J.—That would appear to be only where no rights of third parties intervened.] [He also cited *Marimuttu* v. *Soysa*, 8 S. C. C. 121. L. R. [1891] A. C. 69; *Silva* v. *Sarah Hamy*, Wendt 383; *Ahamado Lebbe Markar* v. *Luis*, 3 S. C. C. 99; *D. C. Kandy* No. 28,383, 2 Lor. 120; *Silva* v. *Ossen Saibo*, 2 C. L. R. 79; Ordinance No. 4 of 1867, section 58; Civil Procedure Code, section 201; *De Leney* v. *Peries*, 8 S. C. C. 94.]

Wendt for the respondents. The whole claim of the appellant is based on the mortgage-decree. That failing, it is the ordinary case of two fiscal's sales, and the respondents' is prior in both date and registration. In *Sinnan* v. *Nicholas*, 9 S. C. C. at p. 94, CLARENCE, J. pointed out that, in the absence of a mortgage-decree, the purchaser in execution took the land-owner's interest as it stood at the date of sale, which interest in the present case was nothing. Now, appellant's mortgage-decree is radically defective: it mentions no obligation which the mortgage is to secure, and does not specify or ascertain any lands at all. In view of the necessity for registering the encumbrance against each separate land affected (*D. C. Badulla* No. 16,101, Vand. 140) the defect is fatal. (See form of mortgage-decree, *Kiri Unga Ne-*

ketta v. *Hawadiya*, 4 S. C. C. 149.) Then assuming the decree to be good in form, it is void for want of registration. It was required to be registered, judgments affecting land being expressly mentioned in section 38 of Ordinance No. 8 of 1863. The mortgage bond having been cancelled and replaced by the mortgage-decree, the latter must be relied on to refer the title back to, and it fails for want of registration. A mortgage-decree is not in Ceylon a decree *in rem.* It used to be such under the Roman-Dutch law, just as all execution sales were proceedings *in rem* and wiped out all encumbrances; but it has always been regarded as different in Ceylon. The district judge was right as to the date to be considered in settling title. On July 13, 1893, the Government Agent made his award of conpensation. On that day the land was converted into money, and in distributing that money only those should share who would have been allotted a share had the distribution then been made. Even if the date of reference to the court, or the date of filing claims in court, be taken, appellant still had no title at those times. [He also cited *Fernando* v. *Fernando*, 1 S. C. R. 250.]

Dornhorst, in reply, cited *Mahamadu Tamby* v. *Mahamadu Ali*, Wendt 293; *Shokkalingam Chetty* v. *Ludovici*, 6 S.C.C. 125. [Bonser, C. J.—Should not every decree for money be registered? It gives the decree-holder a right to levy on the lands of his debtor and to that extent may be said to "affect" his lands.] It has never been considered necessary.

Cur. adv. vult.

On August 28, 1894, the following judgments were delivered:—

Lawrie, A. C. J.—I affirm this decision for other reasons than those given by the learned district judge.

The mortgagee Silva Gunewardene Appuhamy put his bond in suit in *D. C. Galle No.* 48,358 and on September 22, 1882, he obtained a decree in these terms: "It is declared that the plaintiff do recover from "the first defendant the sum of Rs. 500 with interest thereon at 18 per cent. per annum from June "29, 1877, until payment in full and costs of suit. "The property specially mortgaged is declared bound "and executable under this judgment. Bond cancelled."

Instead of promptly enforcing this decree by execution and sale of the mortgaged property, the judgment creditor delayed for more than 10 years. It was not until April 1893, that the property mortgaged was exposed for sale by the fiscal, when it was knocked down to the fifth defendant.

Meanwhile—in the interval between the decree and the sale—the mortgagor's interest in the land was seized and sold by the fiscal under writ against the mortgagor in 1890. By that sale followed by transfer duly registered, the land passed away from the mortgagor. He had no longer any right to or in it. The transfer to the purchasers was of the right title and interest of the owner. I adhere to the law as laid down by this Court by my brother Withers in the case of *Uduma Lebbe* v. *Sego Mohammado*, February 28, 1893, reported in 2 C. L. R. 159, that the estate conveyed by the fiscal is, if not otherwise expressed, the highest estate which at any time during his ownership the owner was capable of alienating.

The conveyance by the fiscal to the first and second defendants did not reserve the rights of any prior mortgagee or judgment-creditor; and the interest acquired by them was an interest adverse to all. Such a sale in execution long after a judgment cannot in my opinion affect those who have meanwhile purchased the land mortgaged and have given publicity to this purchase by registering the transfer to them, if they have not been made parties to the application for execution.

The purchasers of a land encumbered with a mortgage or with a judgment *in re* declaring it executable, as soon as they register the transfer in their favour are entitled to rely on notice to them, if any creditor of their predecessor in title desire to deal with the land as still executable for that predecessor's debt. They can build on or improve the land in confidence that it cannot be seized in execution for the old debt until they have had the opportunity of examining into the state of accounts between the mortgagor and mortgagee, and then if they were satisfied that a debt be due which affected the land, they have right to prevent a sale by paying the debt.

In this case when the sale in execution to enforce the judgment of 1882 was held in 1893, it is doubtful whether the judgment was still in existence; certainly the mere existence of an old decree was not a sufficient ground for the reissue of the writ.

The only subject which the judgment creditor in No. 48,358 could sell in 1893 was the land as it then stood, the property of the first and second defendants. He was bound to give them notice. It he had done so, if he had made these first and second defendants respondents to an application for a reissue of writ and for a sale of the property, he would in all probability have been unsuccessful. First, because of the provisions of section 337 of the Code. Second, because the first and second defendants were of course

not liable personally for the debt, and the land which was their property could be made liable for the former owner's debt only if the judgment was a judgment *in re.*

A proper mortgage judgment duly registered prior to the registration of the first and second defendants' transfer would have been a judgment *in re.* But, first, there was here no proper mortgage decree. It is essential for a mortgage decree that property declared executable shall be specified and described so as to identify it with reasonable certainty. Here the decree was incomplete. It did not say what property was bound and executable—it left it uncertain whether the property was moveable or immoveable.

To affect subsequent purchasers, a mortgage decree should be as specific as the mortgage of which it comes in place, and in my opinion the decree was not a judgment *in re.* It was ineffectual against the first and second defendants, the subsequent purchasers, because it failed to name and identify the lands. In the third place, the decree, if it was a mortgage decree, was not registered, and it is void as against the first and second defendants claiming an adverse interest to it on valuable consideration on a subsequent instrument duly registered.

WITHERS, J.—This is a contest between claims to a fund by persons interested in a parcel of land acquired by the Government for public purposes. It appears to have been admitted in the court below, according to the judgment of the court, that the fourth defendant was the owner of the said land; that, being owner, he mortgaged it in June 1877 by an ordinary contract of hypothec in the same instrument as that which obliged him to pay his creditor a principal sum of money with interest; that the mortgage was registered in the following July; that the mortgagee afterwards put this bond in suit against his debtor and prayed for judgment on the obligation and the contract of hypothec; that on September 22, 1882, he obtained a money and mortgage decree against his debtor; that on July 12, 1890, the first and second claimants herein purchased the debtor's right title and interest in this land at a sale in execution of a third party's judgment and took out a fiscal's certificate of sale on August 4, 1891; that the fifth claimant herein took an assignment of the mortgagee's decree and prosecuted it, and at a sale of the premises under his writ held on April 10, 1893, he bid and bought the land and obtained a fiscal's certificate on November 6, 1893, which he registered the next day. A further fact was elicited during the appeal, viz., that Mr. Wendt's clients, the first and second defendants had their fiscal's certificate registered on March 3, 1892. The main question which the court had to decide was—to which of these respective claimants did the land belong, or rather the proceeds as representing the land?

The district judge decided that the proceeds belonged to Mr. Wendt's clients. He rejected the contention that Mr. Dornhorst's clients' certificate of sale related back to the date of the mortgage in 1877 and conveyed the debtor's property as it existed at that date. Let us examine the respective rights of a judgment-debtor and a judgment-creditor after the latter has obtained an hypothecary decree—assuming one to have been obtained in this instance. The right of the latter, which before action brought was the right to institute an action to have the land judicially sold to satisfy his mortgage debt, has now become a right to have the land sold in execution of his decree. Though he has a *jus in re,* he has no right of property in the land. That still belongs to the judgment-debtor who can sell the land subject to the decree or hold it till the sale, before which it is in his power to convert his limited right of property into an absolute one by satisfying the amount with costs decreed to be paid by him to his judgment-creditor. And what is the right of an innocent purchaser, who, before execution issues under the mortgage decree, buys the right title and interest of the debtor in the land stricken by the decree at a judicial auction under a third party's writ and registers his act of purchase? That is, what is his right in the event, which has happened here, of the judgment-creditor not having registered his mortgage decree? The Ordinance says that the judgment-creditor's decree shall be void as against the registered conveyance, which has priority on account of registration over the decree. The judgment-creditor cannot be thrown back on his contract of mortgage, for that has been merged in or confounded with the decree. What then is left to him by way of remedy? It seems to me that he can rely only on his judgment for the debt and levy this out of other assets belonging to the judgment-debtor. But then it may be asked, are you not enlarging the innocent purchaser's right, who, it is urged, could obtain no more than what the judgment-debtor had at the time of the sale? But what is the effect of the Registration Ordinance advancing the registered purchase after decree in front of the decree itself, but to relieve it of the *jus in re, i.e.,* the right to sell the land in execution of the decree? I take the Ordinance to mean that you cannot enlarge a posterior registered instrument limited on the face of it to a restricted right of property; nor can this advancement of the registered purchase between decree and execution be

considered unfair, for the decree-holder, by his laches in not registering his decree and by leaving the debtor in open possession of the land and free to sell it as if there was no decree upon it, courts the risk of losing his privilege of executing his decree against the land. But what of an innocent purchaser who buys at a sale in execution of the unregistered decree? There is this prior registered conveyance of the judgment-debtor's right title and interest in the land to be considered. Mr. Dornhorst says that some of our judges have expressed the opinion that such a purchaser can supplant the prior purchaser by aid of the prior registered contract of mortgage. But this has been "confounded" with the decree which itself is the foundation of the last purchaser's certificate from the fiscal. This foundation, however, lacks support for want of registration. If the effect of the Ordinance is to give the prior purchaser who has registered his purchase a right of property in the land, relieved from the unregistered mortgage decree, it seems to me that the ultimate purchaser has bought nothing.

This may seem hard law in this particular case because the ultimate purchaser I find paid Rs. 577 for the land, while the prior purchasers paid only Rs. 3 for what was sold to them; but it appears to me to be the law to be administered, and for these reasons I think the judgment must be affirmed.

Affirmed.

———:o:———

Present:—BONSER, C. J. and WITHERS, J.

(*July* 3 *and* 4, 1894)

D. C. Kurunegala, No. 612—M 423. } WALLEAPPA CHETTY v. SINNETAMBY.

Contract—Joint contractors—Promissory note—Survival of liability against surviving makers alone.

Upon a joint contract, where there is no partnership between the contractors, and one of them is dead, the liability to be sued survives to the surviving contractors alone, and not to the surviving contractors and the legal representative of the deceased contractor jointly.

Action on a joint promissory note in plaintiff's favour made by first defendant Sinnetamby, one Sevenden, one Muttu, and one Peramen. The second and third defendants were sued as being the next-of-kin of Sevenden and Muttu deceased and in possession of their estates; and the fourth and fifth defendants as similarly representing Peramen. The second and third defendants alone appeared, and they pleaded that the note was a forgery, and that they were not the representatives of Sevenden and Muttu.

The district judge held the note proved, and gave judgment for plaintiff against first defendant, the estate of Muttu (represented by second and third defendants) and the estate of Peramen (represented by fourth and fifth defendants) jointly.

The second and third defendants appealed.

Wendt, for the appellants.

Dornhorst, for the plaintiff.

[The following cases were cited in the argument:—*Kendall* v. *Hamilton*, 48 L. J. Q. B. 705, L. R. 4 App. Cas. 504; *Ex parte Kendall*, 17 Ves. 514; Byles on Bills, 15th Ed. p. 60; Leake on Contracts, 2nd Ed. p. 450.]

The judgment of the court was delivered by

BONSER, C. J.—This is an action on a promissory note, which was made by four persons in favour of the plaintiff. Three of these four persons are dead, and the survivor is now sued, and with him four persons who are alleged to represent the estates of the deceased makers. The district judge has given judgment for the plaintiff as against all the defendants. Two of the defendants have appealed against the decree, and they are defendants who are sued as representing the estates of two of the deceased makers; and the question arises whether they could properly be sued in this action. The promissory note is a joint one, and not a joint and several one, and there is no question of partnership between the makers. Therefore, the sole point for decision is, whether a personal legal representative of a deceased maker of a joint promissory note can be sued jointly with the surviving maker. By the law of this Colony, actions on promissory notes are governed by the law of England, and the law of England is perfectly clear. The law is stated clearly and concisely in Williams on Executors, 7th Ed., page 1,740, as follows:—"In the "case of a joint contract, where several contract on "the same part, if one of the parties die, his execu-"tor or administrator is at law discharged from all "liability, and the survivor or survivors alone can "be sued. And if all the parties are dead, the exe-"cutor of the survivor is alone liable."

That being the law of England, it must be applied to this action. The only exception to the rule is the case of a partnership, where recourse may be had against the estate of a deceased partner, but that exception does not apply to this case, and therefore this action was wrongly framed and no relief can be had as against the appellants.

The judgment of the district court must be set

aside with regard to the present appellants. Under the circumstances of this case the order will be that neither party shall get costs either in the district court or in this Court.

Reversed.

———:o:———

Present :—WITHERS, J.

(*June* 28 *and July* 2, 1894.)

P. C. Panadura, No. 11,184. } PERERA v. PERERA.

Criminal Law—Compensation Crown costs—Complaint on information Bona fides *of complainant —Revision —Criminal Procedure Code, section* 236.

Where a charge is brought on information and is ultimately dismissed, it is irregular for a police magistrate to impose compensation and crown costs on the complainant, unless the magistrate finds that the complainant did not in fact receive such information or did not *bona fide* believe it to be true.

This was a complaint on information. The police magistrate, after recording evidence, acquitted the accused, holding that the case was false and vexatious, and sentenced the complainant to pay a certain sum by way of compensation and crown costs.

The complainant appealed.

Dornhorst, for the appellant.

There was no appearance of counsel for the defendant on the appeal.

Cur. adv. vult.

On July 2, 1894, the following judgment was delivered :—

WITHERS, J.—I shall deal with the case as if in revision and set aside the entire order as to compensation and crown costs. It is in my opinion irregular. The charge was brought on information. The complainant had lost a tethered bull under circumstances which suggested theft. He received information from his two witnesses which led him to charge the accused with having dishonestly removed his bull. The magistrate disbelieved those witnesses, and acquitted the accused. I do not question the propriety of his finding, but before he punished the complainant for bringing a false and vexatious case, he should have satisfied himself that the complainant received no information which justified a prosecution, or had no honest ground for believing what was told him. He came to court promptly, if ill-advisedly, with his complaint. His *bona fides* not having been tested by the magistrate, I do not think there was any good ground for the imposition of compensation and crown costs,

Set aside.

Present :—LAWRIE and WITHERS, J.J.

(*June* 15 *and* 19, 1894.)

D. C. Colombo, No. C 2,974. } PERICHCHIAPPA CHETTY v. JACOLYN.

Civil procedure—Execution, application for—Decree more than a year old—Decree payable by instalments—Notice to execution-debtor—Civil Procedure Code, sections 194, 347.

Section 347 of the Civil Procedure Code enacts that "in cases where there is no respondent named in the petition of application for execution, if more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the judgment-debtor"

Where the holder of a decree payable by instalments applies for execution on failure of the judgment-debtor to pay an instalment,

Held, that the judgment-debtor is entitled to notice under the above section, if a year has elapsed between the original decree and the application for execution, even though the instalment became due within a year of such application.

In this action a decree was on September 2. 1892, entered against the defendant for Rs. 180 and interest and costs payable in instalments of Rs. 10 on the 2nd day of every month. On September 5, 1893, the plaintiff applied for and obtained a writ of execution against the defendant as upon a default of payment of the instalments due on August 2 and September 2, 1893. The defendant subsequently moved to recall the writ on the ground, among others, that it was irregularly issued, he not having had notice of the application for execution under section 347 of the Civil Procedure Code.

The learned district judge held that the provisions of section 347 did not apply to the case of a decree payable by instalments and disallowed the defendant's motion.

The defendant appealed.

Sampayo, for the appellant.

Wendt, for the plaintiff.

Cur. adv. vult.

On June 19, 1894, the following judgments were delivered :—

LAWRIE, J.—The 347th section of the Civil Procedure Code is imperative. It requires that in all cases where more than a year has elapsed between the date of the decree and the application for its execution the court shall cause the petition to be served on the judgment-debtor.

I am not able to agree with the learned judge that this provision does not apply to the case of an instalment decree.

On the other hand the 194th section of the Code provides that on failure to pay the first or any other

instalment, the whole amount or any balance then due shall on such failure becomes immediately payable.

It is proved that the debtor in this case failed to pay the instalment due in August 1893. The issue of writ without notice to him was irregular but it was an irregularity which really did him no harm. If he had had notice he could only have appealed *ad misericordiam* to the judge or to his creditor.

It was fortunate for the appellant that the district judge refused to recall the writ. If it had been recalled, it would have forthwith been reissued after notice to the debtor. By this appeal he has got much more time than he deserved.

The appeal is dismissed with costs.

WITHERS, J. agreed.

Affirmed.

———:o:———

Present:—LAWRIE, A. C. J.

(*September* 12 *and* 20, 1894.)

C. R. Trincomalie, No. 297. } MURUGUPILLAI v. MUTTELINGAM.

Prescription—Commencement of action—Abatement—Interruption of prescription—Action for goods sold and delivered—Part payment—Promise to pay—Ordinance No. 22 of 1871, sections 9 and 13—Civil Procedure Code, section 402.

Part payment of a debt will not take the case out of prescription unless the payment is made under circumstances from which an acknowledgment of the debt and a promise to pay the balance may reasonably be implied.

Plaintiff, having in May 1891 (when the defendant was absent from Ceylon) commenced an action for the price of goods sold, took no steps to serve the summons out of the jurisdiction, and in 1892 the action was ordered to abate. The defendant having returned to Ceylon, the order of abatement was set aside and summons was served on him,

Held, that under these circumstances the action must be taken to have been commenced, *quoad* the period of limitation, from the date when the order of abatement was set aside.

In the case of a sale of goods, the sale being alleged to have been made on May 11, 1890—

Held, that an action, wherein the plaint was filed on May 11, 1891, was not brought within one year after the debt became due.

Appeal by defendant from a judgment in favour of the plaintiff.

The facts material to this report appear in the judgment of the Supreme Court.

VanLangenberg, for the appellant.

Aserappa, for the plaintiff.

Cur. adv. vult.

On September 20, 1894, the following judgment was delivered :—

LAWRIE, A. C. J.—This action was commenced by the filing of a plaint on May 11, 1891. The defendant was then resident in India. The plaintiff did not take steps (under the 69th section of the Code) to serve summons on him. In 1892 the Commissioner of Requests ordered the action to abate.

The defendant returned to Ceylon, and in May 1894 the order of abatement was set aside and summons was for the first time served on the defendant. In these peculiar circumstances I am of opinion that the action dates from the day on which the abatement was removed.

It is an action for goods sold and delivered. The last sale alleged was on May 11, 1890. If the action was not brought until May 1894, it is barred by the Ordinance. Even if it be held to have been brought on May 11, 1891, (the date of filing the plaint), limitation applies, because the action was not brought *within* the year.

The plaintiff however sought to avoid the Ordinance by alleging and by leading evidence of payments in May and June, 1890.

The law is well stated by Cleasby, B. in *Skeet* v. *Lindsay*, L. R. 2 Ex. D. 314, where he said :—

"There must be one of these three things to take "the case out of the statute. Either there must be an "acknowledgment of the debt from which a promise "to pay is to be implied ; or secondly, there must be "an unconditional promise to pay the debt; or "thirdly, there must be a conditional promise to pay "the debt and evidence that the condition has been "performed."

Part payment of a debt will not take the case out of the statute unless that payment is made under circumstances from which an acknowledgment of the debt and a promise to pay the balance may reasonably be implied.

Proof of the naked fact of payment of a sum of money is not proof of a part payment. A part payment has been defined as "payment of a smaller "on account of a greater sum, due from the person "making the payment to him to whom it is made, "which part payment implies an admission of such "greater sum being then due, and the reason why "the effect of such a payment is not lessened by the "statute is that it is not a mere acknowledgment by "words but it is coupled with a fact." (See *Waters* v *Tompkins*, 2 C. M. & R. p 726.) Applying that law to this case, I hold that the bare fact of small payments

having been made in the latter part of May and beginning of June, 1890, by the defendant to the plaintiff is not capable of being construed as an acknowledgment that a larger sum was then still due and of a promise to pay that larger sum.

Further, I am of opinion that the plaintiff is not entitled to recover on his own unsupported testimony that payments were made. He adduced no corroborative evidence. The defendant strenuously denied that he was in Ceylon at that time and that he made the payments. It would not be safe to avoid the Ordinance on the unsupported testimony of the plaintiff, an interested party.

After consideration, I have come to the conclusion that the plaintiff has not proved the alleged part payments, that the action is prescribed and must be dismissed with costs.

Reversed.

———:o:———

Present:—BONSER, C. J., LAWRIE and WITHERS, JJ.

(*March* 24 *and October* 7, 1896, *and January* 26, 1897.)

D. C. Kandy, No. 6,563. } KARANCHY HAMY *v.* ANGO HAMY.

Marriage—Person with whom adultery has been committed—Legitimation per subsequens matrimonium—*Ordinance No.* 6 *of* 1847, *section* 31—*Donation to concubine and illegitimate children—Validity as against wife and legitimate issue—* Querela inofficiosæ donationis—*Limitation—Ordinance No.* 22 *of* 1871, *section* 11.

The Ordinance No. 6 of 1847 does not contain the whole law regulating the marriages of persons subject to that Ordinance, and the Roman Dutch Law of marriage, so far as it has not been altered by Ordinance, is still in force. By that law a man could not contract a valid marriage with a woman with whom in his wife's lifetime he had committed adultery; and this impediment still exists in Ceylon.

Where therefore a Sinhalese man, a native of the maritime provinces, married to a Sinhalese wife, also a native of those provinces, had during the marriage lived in adultery with another woman, and had after his wife's death gone through the form of marriage with the latter—

Held, per BONSER, C. J., and WITHERS, J. (*dissentiente* LAWRIE, J.), that such marriage was null and void.

Per LAWRIE, J.—The whole law as to disability to marry, applicable to natives of Ceylon, is to be found in our Marriage Ordinances, the old common law having been repealed and abolished; and no prohibition of such a marriage is to be found in those Ordinances, and such marriage is therefore valid.

When a man has made to a concubine or illegitimate child a donation, which his heir desires to impeach by the *querela inofficiosæ donationis*, he must by the Roman Dutch Law bring action within five years of the donor's death; and this period of limitation is now reduced to three years by Ordinance No. 22 of 1871, section 11.

This was an action relative to the administration of the estate of one Gonapenuewela Vitarunege Singho Appu, who had been married in the community of property to one Babunhamy, whose only child and sole heiress the first plaintiff claimed to be. Both Singho Appu and Babunhamy were Buddhist natives of Ahangama, in the Galle District, and their marriage took place there on October 2, 1865. The first defendant, claiming as widow of Singho Appu, was after a contest with the first plaintiff granted letters of administration to his estate.

The facts material to this report were set out as follows by the CHIEF JUSTICE in his judgment:—

"One Singho Appu, who was married in community by property to one Babunhamy, contracted an illicit connexion with the first defendant, and by her had during the lifetime of his wife two children, the second and third defendants. After his wife's death, which happened on the 20th of January, 1883, he went through the form of marriage with the first defendant, and subsequently to this had two more children by her, the fourth and fifth defendants. He died on the 24th of November, 1887, intestate, and the first defendant gave birth to the sixth defendant on the 2nd of October, 1888, that is to say 313 days after Singho Appu's death.

"Singho Appu, on the 19th of April, 1880, his wife Babunhamy being then alive, by a deed of donation gave five parcels of land valued at Rs. 4,980 to the first and third defendants, describing them as 'my wife and her child'. The consideration for the gift is expressed to be an agreement by the donees 'that the said Angohamy should be obedient to me and render me every necessary assistance'. Angohamy was to 'possess the lands during her life, and after that the abovesaid child and any other children which she may bear after this, and their heirs, descendants, and administrators are empowered to possess the said lands'. The deed contained a statement by Angohamy that she accepted the gift. The first plaintiff is the only child of Singho Appu by his wife Babunhamy, and the second plaintiff is her husband. They seek to have the deed of donation set aside as illegal and to have it declared that the intestate and Angohamy were not lawfully married."

The District Judge held that the marriage of Singho Appu to the first defendant was valid (following the opinion of LAWRIE, J., expressed upon the contest for letters of administration to Singho Appu's intestate estate*), that the fourth and fifth defendants were the legitimate issue of that marriage, that the second and third defendants were illegitimate, that the sixth defendant was not the child of Singho Appu, and that the donation of April 19, 1880, was good and valid (following *Parasatty Ummah* v. *Sathopulle*, Ram. (1872) 67).

The plaintiffs appealed.

Dornhorst, for the appellants.

Wendt (*Sampayo* with him), for the defendants.

* D. C. Kandy, No. 1,479, S. C. Civ. Min., July 11, 1888.

[In addition to the authorities referred to in the judgments of the Court, the following were cited at the argument :—Van Leeuwen, *Cens. For.*, 4. 12. 9, 10; Voet, *ad Pand.*, 24. 1. 15, 34. 9. 3; Van der Linden's *Institutes* (Juta's Trans.) 123; Thomson's *Institutes*, vol. 2, pp. 210. 335; *Wijesinghe* v. *Wijesinghe*, 9 S.C.C.199; *Wijeyekoon* v. *Goonewardene*, 2 C. L. R. 59; *Perera* v. *Silva*, 2 C. L. R. 150.]

Cur. adv. vult.

On January 26, 1897, the following judgments were delivered :—

BONSER, C. J.—[After setting out the facts as above stated, his lordship proceeded as follows :—]

On this state of facts the two questions arise which were argued before us, viz.:—

1. Do the defendants or any of them take anything under the intestacy of Singho Appu ?

2. Is the deed of donation invalid to any, and what, extent?

As regards the sixth defendant, her birth occurred at such a distance of time after the death of the intestate that it would be little short of a miracle if she were his child. I am of opinion that the district judge rightly held her not to be his child.

As regards the second and third defendants, it is clear that, being "procreated in adultery", the subsequent marriage of their father and mother, even if legal, could not avail to render them legitimate. (See Ordinance No. 6 of 1847, section 31.)

As regards the first, fourth, and fifth defendants, their rights in respect of the intestate's estate depend on whether the marriage of the intestate with the first defendant was a valid and legal one or not. This raises this important question,—Can a man after the death of his wife marry a woman with whom during the lifetime of his wife he has been living in adultery ? For an answer to this question we must have recourse to the Roman Dutch Law which was stated by the Privy Council in the *Le Mesurier Case* ([1895] A. C. 526) to be undoubtedly the matrimonial law applicable to British or European residents in Ceylon. The reasoning of the Privy Council shews that in this matter there is no distinction between British and European residents and the other residents in Ceylon for whom there is no special matrimonial legislation. If the Roman Dutch Law applies to European residents, it must also apply in the absence of special legislation to other residents.

I had at one time thought that inasmuch as Singho Appu was a resident in the Kandyan Districts the marriage might have been celebrated under the Kandyan Marriage Act, in which case it would have been valid and the second and third defendants, although born in adultery, might have been legitimatized by the subsequent marriage. But it appears that the marriage was not in fact celebrated under the Kandyan Marriage Act, but was celebrated under the general marriage law of the Colony.

It would appear that according to the old Roman Dutch Law, following the Canon Law, such a marriage was not forbidden unless a promise of marriage had passed between the guilty parties during the lifetime of the innocent spouse, or unless they had been guilty of an attempt against such spouse's life. Subsequently, however, by a Placaat of the 18th of July, 1674, such marriages were altogether forbidden, and even if contracted were to be null and void, should it subsequently appear that the parties had been guilty of adultery with one another during the lifetime of the deceased spouse. Voet thus forcibly states the reasons for and the object of this law :—"Cum et ipsa adulteria latebras quærant et clandestina soleat esse inter adulteros fidei matrimonialis interpositio, insidiæque ac machinationes in conjugis insontis perniciem structæ ignotæ sæpe sæpius difficilis probationis, satius visum fuit matrimonia hujuscemodi in universum damnare ac vetare, ac re ipsa contracta pro nullis habere, si forte crimen (*i. e.*, adulterii) initio matrimonii ignoratum postea manifestum fiat; ut ita in adulterii crimen prolapsi deterreantur ab insidiis insonti struendis nullum post hanc legem triumphum habituris; aut si maxime desint insidiæ, careant saltem dilecti moechi moechæve consortio, nec libere licenterque illis fruantur amoribus qui suum non honestati sed sceleri initium debent." (*Comm. ad Pand.*, 23.2.27.) The annals of crime unfortunately afford many instances which illustrate the policy of such an enactment. This law did not become obsolete, for Van der Linden in his Institutes of Holland, published in 1806 (Juta's Translation, p. 19), states that marriages between persons who had previously committed adultery were void, and that no dispensation could be granted.

It was suggested that this part of the Roman Dutch Law of marriage had been impliedly repealed by Ordinance No. 6 of 1847, and reference was made to the case of *Abeyeratne* v. *Perera*, 3 Lor. 235, where this Court held that the marriage of a widower with his deceased wife's sister, which was illegal by Roman Dutch Law, was lawful since the passing of that Ordinance. But that decision went on the ground that "the 27th section was introduced to establish the entire law *as to the prohibited degrees of relationship*" and that therefore the omission of the relations by affinity in the enumeration of the prohibited degrees shewed that the Legislature intended to remove the previously existing prohibitions against intermarriage between persons related to one another by affinity and to render such marriages legal. That case is no authority for the proposition that every marriage not expressly forbidden by the Ordinance is allowed, but rather points the other way. It cannot be assumed that the Legislature intended tacitly to abolish a provision so well calculated to protect the lives of innocent spouses and to discourage immorality. Nor can it be successfully contended that that Ordinance was intended to comprise the whole law of marriage in the face of the express declaration in section 55 that "this Ordinance does not profess to treat of or to declare the whole law of marriage". Nor does the fact that section 31, which declares that children are legitimatized by the subsequent marriage of their parents, commences with the words "from and after the notification in the *Gazette* of the confirmation of this Ordinance by Her Majesty" lead me, as it does my brother Lawrie, to the conclusion that the

Legislature were of opinion that the Roman Dutch Law of legitimation *per subsequens matrimonium* was not in force in the Colony, when I observe that the prohibition of incestuous marriages between fathers and daughters, and of bigamous marriages, is also made dependent on the confirmation by Her Majesty of the Ordinance, for I cannot conclude that the Legislature thought that such marriages were then legal.

I am therefore of opinion that the so-called marriage between Singho Appu and Angohamy was altogether null and void, and that neither she nor the fourth and fifth defendants, who were born during that marriage, are entitled to any share of the intestate's estate.

I now come to the second question. It is quite true, as pointed out by this Court in *Parasatty Ummah* v. *Sathopulle* (Ram. 1872, p. 67), that by the old Roman Law the prohibition of gifts by husbands to their wives did not extend to gifts by a man to his concubine. But this freedom was restrained by the later Emperors. Constantine appears to have prohibited all gifts or bequests to concubines and natural children. Justinian relaxed this rule, with the result that if a man had legitimate children he could not give his natural children or concubine more than one-twelfth of his property; but if he had neither children nor ascendants, he could give all his property to them.

The Roman Dutch Law did not acknowledge the condition of concubinage, and placed concubines and other abandoned women on the same footing (Grotius, Introd., 1. 12. 5); and whatever the Roman Law may have been, by the Roman Dutch Law, according to Van Leeuwen (*Cens. For.*, 4. 12. 11), "quicquid concubinis *qua talibus* inter vivos donatur aut per ultimam voluntatem relinquitur, ab eis tanquam a personis turpibus atque indiginis auferri et avocari potest". The words "qua talibus" are emphatic. It is not every gift to a concubine that can be taken from her, but only such gifts as are made to her in her capacity as a concubine and in contemplation of the continuance of the relationship.

In the present case the gift is made on the express condition of the continuance of the connexion and is thus differentiated from the case of *Parasatty Ummah* v. *Sathopulle*. At the same time I must confess that I do not understand that case, which seems to have been decided, not on the Roman Dutch Law or the later Roman Law, but on the Roman Law as it existed before Christianity became the established religion of the Roman Empire.

I am therefore of opinion that the gift to the first defendant is one that could be set aside and recalled.

As regards the second and third defendants, although by Roman Dutch Law illegitimate children born *ex prohibito concubitu* were prohibited from taking any benefit under their parents' will beyond bare maintenance (Grotius, Introd., 2. 16. 6, and Van der Linden (Juta) p. 58), yet according to Van Leeuwen "*pro adulteriis et ex damnato legibus coitu natis non habentur qui ex conjugato et soluta nati sunt*, and the prohibition did not extend to them. (*Cens. For.*, 3. 4. 39.) The second and third defendants are therefore in the same position as the fourth and fifth defendants.

What then is the law with regard to the power of a father to make provision for his illegitimate children? By the Roman Dutch Law, if a parent disinherited his legitimate children, they were entitled to a *querela inofficiosi testamenti;* but Ordinance No. 21 of 1844 abolished that right and gave a testator full power of disposition in favour of "such person or persons *not legally incapacitated from taking the same* as he shall see fit". By the words "legally incapacitated from taking the same" I understand to be meant incapable of taking by bequest from the testator in any circumstances. Now, Van der Linden (Juta, p. 58) states the law thus: "Bastards begotten in adultery or incest may not be benefited (*i. e.*, by the parents' will) with more than that which is required for their necessary maintenance. One may leave to other illegitimate children as much as one pleases, unless one has at the same time legitimate children, in which case only a twelfth part may be left to the former." It would appear from this that ordinary bastards were not legally incapacitated from taking under their parents' will, whereas adulterine or incestuous bastards were. The effect therefore of the Ordinance No. 21 of 1844 is to give the father the full power to leave all or any part of his property to the former class, at all events.

Then, is there any difference between a will and a donation *inter vivos?* According to Van der Linden (Juta, p. 125) a donation could be impeached "when the donation is so excessive that the children are thereby prejudiced in their legitimate portion, in which case the whole gift is not annulled but only the *pars inofficiosa*"; and Grotious (Introd., 3. 2. 19) thus states the law on this head: "But if a person makes a donation to one of his children or a stranger, whereby his estate is so reduced that his children will not receive the legitimate portion to which they are entitled from their father's estate, in spite of the last will the children who are thereby prejudiced may have the donation set aside in the same way as they might have the will set aside, and no further."

The remedy given by law to the children was the *querela inofficiosæ donationis*, of which Voet says: "in plerisque cum inofficiosi testamenti querela pari passu ambulat, adeo ut ab interpretibus traditum sit statuta de inofficiosis testamentis quid definentia etiam ad inofficiosas donationes in dubio producenda esse, et merito, cum enim ad intervertendam inofficiosi testamenti querelam nonnulli patrimonia sua donationibus exiuanirent, deinde ejus, quod restabat, portionem legitimam relinquerent." (*Comm. ad Pand.*, 39. 5. 36.) This shows the close connexion between the two remedies and that they were both based on one and the same right, viz., the right of the children to have their legitimate share of their parents' property. Indeed, the father, instead of being regarded as the absolute owner of his property, was considered in some sort as a joint owner with his children, who might assert their rights after his death by the *querela inofficiosi testamenti*, and even in his lifetime by the *querela inofficiosæ donationis* if these rights were endangered by improper donations. Now that Ordinance No. 21 of 1844 has abolished the right of the children to a legitimate portion, and with it the *querela inofficiosi testamenti*, must not

the corresponding *querela inofficiosæ donationis* be deemed to have been impliedly repealed? In my opinion the maxim *Cessante ratione cessat lex* applies, and there is nothing now to prevent a father from making provision either by will or act *inter vivos* for his ordinary illegitimate children even to the extent of leaving his legitimate children penniless and dependent on charity for their daily bread. Whether this liberty extends to adulterine and incestuous bastards (*adulterini et ex damnato legibus coitu nati)* it is not necessary now to decide.

As regards the sixth defendant, no law prevents her from receiving a benefit from the intestate, who was not her father. But whether I am right or not in holding that the *querela inofficiosæ donationis* no longer exists, it is clear that it would not be available in the present case. By the Roman Dutch Law the *querela* must have been instituted within five years from the death of the donor. That period, under our present law of prescription, would be three years. This action was not commenced till the 31st of January, 1893, and the donor died on the 24th of November, 1887. I am therefore of opinion that the deed of donation cannot be set aside, and the defendants are entitled to the property comprised therein.

LAWRIE, J.—An important question is raised by the 8th issue, "whether the marriage between Singho Appu and the defendant was a valid marriage, cohabitation having commenced during the lifetime of Babunhamy" (that is during the lifetime of Singho Appu's wife)?

It is my opinion that the law as to the constitution of marriage between natives of Ceylon marrying in the island is regulated by Ordinances which contain the whole law on the subject.

There are three legal disabilities which render sane parties incapable of forming the contract of marriage. These are (1) a prior existing marriage, (2) want of age, (3) being within the prohibited degrees of consanguinity. The Ordinances deal expressly with these three disabilities. It was argued that there was a fourth disability which is not mentioned in the Ordinances.

I may support my refusal to approve of this addition to our statutes by pointing out how necessary it is that this branch of the law should be expressly declared in enactments accessible to and known to all. Other parts of the law may be left to experts, but it should be within the power of every man to ascertain for himself whether he may or may not lawfully marry the woman on whom he has fixed his regard. The Ordinances profess to tell him a great deal: it is natural to assume that they contain all the law on the subject, because there is no reservation or reference to some other unexpressed law.

I would not add a disability to those expressly declared by Ordinance, and in this I follow the reasoning and ruling of this Court in the case of *Abeyeratne* v. *Perera*, July 21st, 1859, 3 Lor. 235.

I do not need to rest my judgment on a denial that the Dutch Law of marriage ever applied to non-Christian Sinhalese. I am of the opinion that the Dutch did not impose their Christian views or law of marriage on the native population. There are abundant proofs in the history and law of marriage to shew that natives, whether Sinhalese or Tamil, were permitted the exercise of their peculiar customs and laws. The Dutch and Burgher inhabitants who were Christians could marry only those whom the law of Holland permitted them to marry, but the natives were left to their own ceremonies and to their own customs.

Even with regard to Dutchmen and their descendants in Ceylon, the statute which prohibited the marriage of those who had lived in adultery was not part of the common law of Holland: it was a change in the law made after the Dutch took the seaboard of Ceylon. We were not referred to any authority for the proposition that changes by statute in the Dutch Law after the Colony was established affected the Colony. Certainly it is the rule in Colonies of England that though they have the English law as it existed when the Colony was formed, subsequent acts of Parliament do not affect the Colonies unless they are specially named.

In this case the parties to the marriage were not only Sinhalese Buddhists, but they resided and the marriage took place in the Kandyan Provinces, within which Dutch men and Dutch Law had never any hold or footing, until by an unhappy Ordinance, in 1852, it was declared that the law of the maritime provinces was to be the law of the Kandyan provinces whenever the Kandyan Law was silent. The Kandyan Law was not silent as to the capacity to marry. In that direction it was liberal, and knew but few restrictions, and the fact that the man and woman had lived together before marriage, so far from being a disqualification, would (I think) by the Kandyan Law have been thought a good reason for making the woman an honest woman as soon as possible, an opinion I heartily hold, notwithstanding the later Puritan legislation of the Hollanders.

I rest my judgment on this proposition, that the whole law as to ability and disability to marry applicable to natives of Ceylon is to be found in our Statute law; that the old common law, whether Dutch or English or Tamil or Kandyan, or of any place or race in the Island, has been repealed and abolished.

These Ordinances permit an unmarried man of full age and understanding to marry an unmarried woman of full age and understanding who does not stand to the man within the prohibited degrees enumerated in the Ordinances. Appu Singho and the defendant fulfilled these conditions. My opinion is that the marriage contracted by them was a valid marriage, and I would so answer the question put in the 8th issue. I am of the opinion that the two children born in the lifetime of Babunhamy are illegitimate and that the child born after Appu Singho's death cannot be regarded as his.

I am of the opinion that that part of this action which seeks to set aside the donation of 1880 is barred by the 11th section of the Prescription Ordinance.

The plaintiff, both in the court below and in the

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petition of appeal, urged that the deed of 1880 was a last will. If it be, then certainly it must receive full effect, unless by that will Appu Singho dealt with more than his half of the goods in communion. The Ordinance of 1844 gives full powers of testing; and as a will speaks as at the testator's death, there can be no objection to the defendant and her child taking under it. She was not at that date living in adultery; Babunhamy was then dead.

In appeal the appellant abandoned the contention that the deed of 1880 was a will. She maintained that it was a donation void *ob turpem causam*. It is trite law that a contract tending to promote fornication or prostitution is absolutely null and void; and if the donor in this case instead of making an irrevocable donation had given a bond, promissory note, or a security for the payment of money, the woman could not have maintained an action on it; but a completed donation is a different thing.

I am of the opinion that the donation to the illegitimate child mentioned in the deed is good, and that he is entitled to the share of land gifted to him. With respect to the defendant, I think she must bring the land then given to her into hotch-potch; if she prefers to keep that land, she must treat it as part of the half of the goods of her husband to which she as widow is entitled. It seems to me that advances made to a wife and children before the husband's death must be treated as an advance, an instalment of part of the share of that to which they succeed in the event of intestacy. This defendant cannot object to being placed in the same position as a widow to whom an advance has, by deed, been made.

I would give to the plaintiff, as her mother's sole heir, half of the estate, in which I would include the land dealt with by the donation, after taking from that land the share given to the illegitimate child.

Then I would divide the other half in two, half to go to the defendant as widow, half to the plaintiff and the children born after the marriage of Appu Singho and the defendant (excluding the posthumous child).

Withers, J.—Two questions come up for decision in this case, one relating to an act of donation by the late Singho Appu, the other relating to rights of succession and inheritance to his property.

The first cause of action depends on the validity of the said act of donation. Is it invalid in whole or in part, or not at all?

The action, so far as this question is concerned, is of a kind known to the old law as *querela inofficiosæ donationis*. This cause of action arose on the death of the donor, and was given to the legitimate heir whose rights had been affected by the disposition of the donor. The remedy was open to the injured party for five years after the death of the donor.

It seems to me unnecessary to discuss the interesting points of law which this matter involves, for it is clear that the remedy under this head is barred by our Ordinance relating to limitation of actions, No, 22 of 1871.

The next question is,—Can the 1st defendant and the other children or any of them take anything of Singho Appu's estate which he left undisposed of?

Singho Appu was a low-country man by origin. What the defendant's domicile of origin was does not appear. Though residents at the time of their alleged marriage in the Central Province, they were not married in manner and form required by our law in Kandyan marriages. Theirs was the form prescribed by law for natives of the maritime settlements. Their status is governed by the law of those settlements. The two children born in adultery certainly cannot take anything, for the alleged subsequent marriage of their father and mother cannot operate to legitimate them. (See section 31 of Ordinance No. 6 of 1847.)

Was the second so-called marriage one that the law recognises? Our local statutes do not help us. The Ordinance No. 6 of 1847 deals only with the prohibited degrees. It does not touch this case. We must therefore have recourse to the Roman Dutch Law.

According to Van der Linden (p. 19) a marriage between those who have previously lived in adultery is absolutely void. Singho Appu was living in adultery with the first defendant before their so-called marriage. It is therefore void. The children of that marriage being bastards, they can take nothing *ab intestato* from their father's estate.

In the result I am of opinion that the defendants are entitled to the property comprised in the donation.

The costs of the trial of the above questions and of the appeal to be borne out of the estate of the late Singho Appu.

Varied.

———:o:———

Present:—Bonser, C. J., Lawrie and Withers, JJ.

(*December* 4, 1896, *and January* 22, 1897.)

D. C. Galle, No. 2,734. } Jafferjee *v.* Sebo.

Promissory note—Note made by attorney—Form of signature—Bills of Exchange Act, 1882, *sections* 23, 26.

The defendant Sebo carried on the business of a general shopkeeper by an attorney Gira, to whom she had granted a power authorizing him to make promissory notes in her name and for her for the purposes of the business. Gira for such purposes made and granted to plaintiff a promissory note beginning "I the undersigned promise" and signed in Sinhalese with certain words, translated as "Sebo's attorney Gira".

In an action upon the note—

Held, per Lawrie and Withers, JJ. (*dissentiente* Bonser, C. J.), that the defendant was liable.

Per Lawrie, J.—On the ground that the signature must be read as "Sebo by her attorney Gira".

Per Withers, J.—On the ground that whether or not the note bore the signature of Sebo by procuration was a question of fact, and that the signature sufficiently expressed that Gira subscribed for Sebo.

Per Bonser, C. J., *dissentientem.*—The note was, within the meaning of the Bills of Exchange Act, 1882, "signed as maker", not by defendant, but by Gira, and the addition to his signature was merely of "words describing him as an agent", which did not exempt him from personal liability.

Action by payee against maker of a promissory note, alleged to have been made by the defendant by her attorney Gira.

The facts sufficiently appear in the judgment of the CHIEF JUSTICE.

The district judge held as follows:—"I hold that Gira signed the note in question as Sebo's attorney and that the note was given in connection with defendant's boutique business. In the precisely similar case, No. 2,723 *, brought by plaintiff against defendant, the Supreme Court has held that the issue was,—Did Gira sign the note in course of Sebo's business? A like issue arises in the present case, which, as already stated, I decide in the affirmative. I have not to determine whether Gira could be held personally liable on this note, as the question does not arise." Judgment was therefore given for the plaintiff.

The defendant appealed.

The case was first argued, on November 20, 1896, before the CHIEF JUSTICE and LAWRIE, J., by whose order it was re-argued before the Full Court.

Sampayo, for the appellant.

Dornhorst, for the plaintiff.

The following cases were cited in the argument:—*Mare* v. *Charles*, 25 L. J. Q. B. 119, 5 E. & B. 978; *Lord* v. *Hall*, 9 L. J. C. P. 147, 8 C. B. 627; *Lindus* v. *Melrose*, 27 L. J. Ex. 326, 328, 3 H. & N. 177; *Walaayappa Chetty* v. *Suppermanian Chetty*, 4 S. C. C. 91; *The Bank of Madras* v. *Weerappa Chetty*, 7 S. C. C. 89; *Ana Pitchey* v. *Kalloo*, Ram. (1876) 244; *Ibrahim Saibo* v. *Moona Koona Sinne Carpen* (D. C. Colombo, No. C2,362)

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* D. C. Galle, No. 2,723. JAFFERJEE v SEBO.

This was an action between the same parties as in action No. 2,734, on a promissory note dated February 27, 1894, signed in precisely the same way as the note set out by the Chief Justice, and in the following terms:—

"On the 27th March 1894 I the undersigned promise to pay to Carimjee Jafferjee, Esq., or order at the M. Bank of Galle and not elsewhere the sum of Rs. 374·59 currency for value received." The defendant pleaded that the note was not her note but Gira's, and that Gira had no authority from her to make it.

The district judge refused to accept the contention that the signature was equivalent to "P. S. Sebo by attorney Gira". It was possible to express clearly in Sinhalese the expression "by his attorney", and the words in the signature did not necessarily carry that meaning. He therefore dismissed the action.

Plaintiff appealed.

January 31, 1895. *Dornhorst*, for the appellant.
Wendt, for the defendant.

Cur. adv. vult.

February 7, 1895. LAWRIE, A.C.J.—I cannot say that I feel any doubt that the signature "P. S. Sebo's attorney Gira" is an unambiguous indication that Gira signed for and on behalf of a principal P. S. Sebo. Sebo, of course, is bound only if Gira had authority; if he had, he bound her by the note so signed.

I would be content to set aside the judgment and to give judgment for the plaintiff as prayed for, because I see that the district judge notes that he understood the defence of want of authority was abandoned; but as it is possible that there may be a mistake as to this, I assent to the order proposed by my brother WITHERS.

WITHERS, J.—The question for decision in this case is whether Sebo the defendant is personally liable to the plaintiff on the note sued on which is signed in this way, "Sebo's attorney Gira". Mr. Wendt, in support of the judgment, relied on the 26th section of the Bills of Exchange Act, which enacts that (1) when a person signs a bill as drawer indorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon, but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability; (2) in determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written the construction most favourable to the validity of the instrument shall be adopted.

Mr. Dornhorst's answer to this was, that the Act does not thereby exempt the principal. It only declares that a person who signs a bill describing himself as agent of another renders himself personally liable on that bill.

Section 23 of the Bills of Exchange Act enacts that no person is liable as drawer acceptor or indorser on a bill who has not signed it as such. This is declaratory of the law merchant, according to which no person can be sued unless he appears as party by name or designation on the face of the instrument.

This is an exception to the ordinary rule of law that an unnamed principal may be sued upon the written contract signed by the agent in his own name. But the principal is not unnamed on the face of this instrument. Sebo's name is there. Gira has possibly made himself liable on this instrument, but the question is has not Sebo too? Can it be said that making Gira liable is adopting the most favourable construction of the instrument? Is it not an equally favourable construction to regard Sebo as a signatory? Is it impossible for a signature to be so expressed as to create an alternative liability? In the well known case of *Leadbitter* v. *Farrow* (5 M. & S. 345), the form of the bill was:—

N. G. 205.
50£. Hexham, June 8, 1815.
Forty days after date, pay to the order of Mr. Thomas Leadbitter, fifty pounds value received, which place to the account of the Durham Bank, as advised.
Messrs. Wetherell,
Stokes, Mowbray,
Hollingsworth (Signed) CHRISTR. FARROW.
& Co., Bankers,
London.

Lord Ellenborough, in his judgment, observed: "I do not say whether an action would lie against the Durham Bank, because, considering it in either way, it would not, as it seems to me, affect the liability of the defendant."

In *Lindus* v. *Bradwell* (5 C. B. 583), the court went so far as to pronounce a husband to whom a bill had been directed for acceptance liable on the signature, as acceptor, of his wife "Mary Bradwell" because he had authorised her to sign all his bills in her name. The terms of the 23rd and 26th sections of the Bills of Exchange Act may not allow a similar decision, but see section 91 (1) of the same Act.

On the whole, I come to the conclusion that the case ought to go back for trial on the issue whether Gira signed this note in the course of Sebo's business; and for this purpose I would set aside the judgment, giving the appellant his costs in appeal.

BROWNE, A. J.—I agree. It is proper that the issue suggested by my brother Withers should be tried. My views on such a question as was here raised were fully expressed by me in D. C. Colombo No. C2,362., but it seems to me the issue now proposed (for none was specified when that action was remitted for trial) is one which should be determined.

S. C. Civ. Min. March 3, 1893; judgment in the present action, dated November 8, 1894, upon defendant's appeal against refusal of leave to appear and defend.

Cur. adv. vult.

On January 22, 1897, the following judgments were delivered:—

Bonser, C. J.—In this case I have the misfortune to differ from the rest of the Court. The question to be decided is whether the defendant Pattiniyadurage Sebo, who is sued as P. S. Sebo, is liable on a promissory note which was made by one Gira. It appears that the defendant, who is a widow carrying on the business of a general shopkeeper in Galle, duly appointed Gira to manage the business for her, and empowered him to "sign and grant promissory notes regarding the transactions of the aforesaid trade in my name and for me".

Gira made and gave to the plaintiff on the 1st of March, 1894, the note now sued on, which (so far as is material) was in the following words and figures:—

On the *first* day of *April, 1894.*

I the undersigned ....
promise to pay to Carimjee Jafferjee, Esq., or order at the......... ....*M. Bank Galle* ....
and not elsewhere the sum of Rupees *Four hundred and Fifty and cents Nine-eight only*..................
currency for value received."

The words and figures in italics are in writing, the rest is printed. The signature of the maker is in Sinhalese, and being translated is "P. S. Sebo's attorney Gira".

Now, according to Ordinance No. 5 of 1852, section 2, this instrument is to be construed as if it had been made in England. We must therefore apply to it the provisions of the Bills of Exchange Act, 1882, and the question is whether the defendant would be liable on a note in this form made in England. This question is quite distinct from the question whether the defendant is liable for debts contracted by her attorney Gira.

Now, in order that a person should be liable as the maker of a promissory note it is necessary that the note "should be *signed by him as such maker*" (section 23). "It is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority" (section 91). But it must bear *his signature.* Nor is it necessary in all cases that the name which is signed should be his own proper name. It may be a trade name or a name assumed generally or for one particular occasion only (section 23 (1)). For instance, Smith may have assumed the name of Robinson either generally or for trade purposes only, and if he signs a promissory note with the name Robinson either with his own hand or by the hand of his agent, he will be liable just as if he had signed his own proper name. So, if from caprice or for some other reason he signs a promissory note with the name Robinson on one occasion only his liability is undoubted. Again, when a firm name is signed that signature is equivalent to the signatures of all the individual partners (section 23 (2)). And there would seem to be no doubt that a person may sign by affixing a mark. But except in the cases just referred to, the signature must be the maker's own proper name.

It was argued that the signature in this case should be read as "P. S. Sebo by her attorney Gira". If this be so *cadit quæstio.* But that is paraphrase, not translation.

The question is not what Gira meant, but what he has actually written. It seems to me that the case comes within the express words of section 26 (1). Gira signed as maker, and I read the rest of the signature as being "the mere addition of words describing him as an agent". I do not see how clause (2) of that section can apply, for whether this signature be determined to be the signature of Gira or of the defendant, in either case the note is valid. The name of the maker does not occur in the body of the instrument. Had the note run thus: "I the undersigned P. S. Sebo promise," &c., that clause might possibly have applied.

I am of opinion that the defendant is not liable on this note as maker because, to use the words of the Act, "she has not signed it as such". The power of attorney only authorised Gira to sign notes in the defendant's name, so that unless the note is made in her own proper name it is not within the authority.

The order of the Court will be in accordance with the opinions of my brothers, that the appeal be dismissed with costs.

Lawrie, J.—I read the signature on the promissory note to be "P. S. Sebo by her attorney Gira".

Therefore I am for affirming the judgment.

Withers, J.—There can be no doubt as to the law on this point. It is the application of the law to the particular circumstances which has to be considered. An agent who signs a promissory note for a principal does so either by simply writing his principal's name or by writing that and his own name as well. If the principal's name does not appear at all in the body of the note or signature, the principal cannot be bound. Section 23, read with section 89 of the Bills of Exchange Act, declares this to be the law—"No person is liable as drawer indorser or acceptor of a bill who has not signed it as such."

Then section 26 of that Act enacts that "if a person signs a bill as drawer and adds words to his signature indicating that he signs for or on behalf of a principal or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability".

It becomes therefore a question of fact. Does the note before us bear Sebo's signature by procuration? The signature is in Sinhalese, and we are informed that the literal translation word for word is "Sebo's attorney Gira". But is this the exact equivalent in English? What is the true sense? Are the words "Sebo's attorney Gira" simply descriptive of Gira and marking him from others of that name? Or do they signify that Gira signs on Sebo's behalf? We know

that at the time of the making of the note Gira was the duly appointed manager of Sebo's trade business, and that in that capacity he held a power of attorney authorising him to sign and grant promissory notes in Sebo's name and for Sebo. The Bills of Exchange Act, section 26 (2), directs that in deciding whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the note should be adopted. If Gira, according to the true sense of the signature, is not liable as agent, the note is in peril of becoming a dead letter.

But as Sebo's name is on the note, then if Gira's subscription sufficiently express that he subscribes for Sebo, as I think it does, the construction to be adopted is that it is Sebo's note. Verba sunt ita intelligenda ut res magis valeat quam pereat.

I am for affirming the judgment in consequence.

Affirmed.

END OF THIRD VOLUME.

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ERRATA.

Page.	*Column.*	*Line.*	*For*	*Read*
31 ..	2 ..	15 ..	that ..	than
35 ..	1 ..	12 ..	8 of 1871 ..	3 of 1876
35 ..	2 ..	43 ..	Nugara the— ..	Nugara, the tenth defendant
47 ..	1 ..	45 ..	Manuél ..	Manual
71 ..	2 ..	32 ..	3 of 1863 ..	8 of 1863
72 ..	1 ..	9 ..	even ..	ever
76 ..	2 ..		Head note should read	"mortgaged it in January, 1882."
83 ..	1 ..	22 ..	No. 31,394 ..	No. 31,393.